

APPEAL,CLOSED,DFM,EFILE,MOTREF,REFCNF

U.S. District Court
United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:08-cv-01644-RNC

Harris v. O'Hare et al
Assigned to: Judge Robert N. Chatigny
Referred to: Judge Donna F. Martinez
Judge Donna F. Martinez (Settlement)
Cause: 42:1983 Civil Rights Act

Date Filed: 10/28/2008
Date Terminated: 09/28/2012
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff**Glen Harris***Ind & PPA as guardian for K.H., a minor
child*

represented by **Jon L. Schoenhorn**
Jon L. Schoenhorn & Associates LLC
108 Oak Street
Hartford, CT 06106-1514
860-278-3500
Fax: 860-278-6393
Email: civlrights@aol.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant**Johnmichael O'Hare**

represented by **Alan Raymond Dembiczak**
Howd & Ludorf, LLC
65 Wethersfield Ave.
Hartford, CT 06114-1190
860-249-1365
Fax: 860-249-7665
Email: adembiczak@hl-law.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nathalie Feola-Guerrieri

City of Hartford
Office of the Corporation Counsel
550 Main Street
Hartford, CT 06103
860-757-9709
Fax: 860-722-8085
Email: feoln001@hartford.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas R. Gerarde

Howd & Ludorf
 65 Wethersfield Ave.
 Hartford, CT 06114-1190
 860-249-1361
 Fax: 860-249-7665
 Email: tgerarde@hl-law.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Anthony Pia

represented by **Alan Raymond Dembiczak**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Nathalie Feola-Guerrieri
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Thomas R. Gerarde
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED










Defendant








City of Hartford

represented by **Nathalie Feola-Guerrieri**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	clear	Docket Text
10/28/2008	1	<input type="checkbox"/> 73.06KB	COMPLAINT against Johnmichael O'Hare, Anthony Pia, City of Hartford (Filing fee \$ 350 receipt number H026780), filed by Glen Harris.(Ferguson, L.) (Entered: 10/28/2008)
10/28/2008	2	<input type="checkbox"/> 27.76KB	Order on Pretrial Deadlines: Amended Pleadings due by 12/27/2008 Discovery due by 4/29/2009. Signed by Clerk on 10/28/08. (Ferguson, L.) (Entered: 10/28/2008)
10/28/2008	3	<input type="checkbox"/> 43.21KB	ELECTRONIC FILING ORDER - PLEASE ENSURE COMPLIANCE WITH COURTESY COPY REQUIREMENTS IN THIS ORDER. Signed by Judge Robert N. Chatigny on 10/28/08. (Attachments: # 1 Notice)(Ferguson, L.) (Entered: 10/28/2008)
12/12/2008	4	<input type="checkbox"/> 57.56KB	WAIVER OF SERVICE Returned Executed as to Johnmichael O'Hare waiver sent on 10/28/2008, answer due 12/27/2008. filed by Glen Harris. (Schoenhorn, Jon) (Entered: 12/12/2008)



12/12/2008	<u>5</u>	<input type="checkbox"/> 59.06KB	WAIVER OF SERVICE Returned Executed as to Anthony Pia waiver sent on 10/28/2008, answer due 12/27/2008; City of Hartford waiver sent on 10/28/2008, answer due 12/27/2008. filed by Glen Harris. (Schoenhorn, Jon) (Entered: 12/12/2008)
12/23/2008	<u>6</u>	<input type="checkbox"/> 24.98KB	<i>Defendants'</i> ANSWER to 1 Complaint with Affirmative Defenses by Johnmichael O'Hare, Anthony Pia, City of Hartford.(Feola-Guerrieri, Nathalie) (Entered: 12/23/2008)
12/24/2008	<u>7</u>	<input type="checkbox"/> 16.77KB	NOTICE of Appearance by Nathalie Feola-Guerrieri on behalf of Johnmichael O'Hare, Anthony Pia, City of Hartford (Feola-Guerrieri, Nathalie) (Entered: 12/24/2008)
12/24/2008	<u>8</u>	<input type="checkbox"/> 23.01KB	REPORT of Rule 26(f) Planning Meeting. (Schoenhorn, Jon) (Entered: 12/24/2008)
12/30/2008	<u>9</u>	<input type="checkbox"/> 59.04KB	ORDER REFERRING CASE to Magistrate Judge Donna F. Martinez for settlement conference. Signed by Judge Robert N. Chatigny on 12/30/08. (Montgomery, A.) (Entered: 12/30/2008)
12/31/2008	10		ORDER : A telephonic status conference is scheduled for 1/16/09 at 10:30 a.m. with Judge Martinez. The purpose of the call is to discuss when a settlement conference is most likely to be productive. Plaintiff's counsel shall initiate the conference call and shall have opposing counsel on the line when calling chambers at (860) 240 3605. (Constantine, A.) (Entered: 12/31/2008)
12/31/2008			Set Deadlines/Hearings: TELEPHONIC Status Conference set for 1/16/2009 @ 10:30 AM before Judge Donna F. Martinez (Glynn, T.) (Entered: 01/05/2009)
01/05/2009	<u>11</u>	<input type="checkbox"/> 45.94KB	SCHEDULING ORDER: Amended Pleadings due by 1/31/2009 Discovery due by 5/31/2009 Status Report due by 3/31/2009 Trial Ready Date 8/1/2009 Trial Brief due by 6/30/2009. Signed by Judge Robert N. Chatigny on 12/31/08. (Montgomery, A.) Modified on 1/7/2009 to correct filing date (S-D'Onofrio, B.). (Entered: 01/06/2009)
01/07/2009	<u>12</u>	<input type="checkbox"/> 45.94KB	Docket Entry Correction Document number 11 Scheduling Order modified to correct filing date. (S-D'Onofrio, B.) (Entered: 01/07/2009)
01/09/2009	13		NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. At the request of defense counsel and absent objection, the telephonic status conference with Judge Martinez is rescheduled to Tuesday 1/20/09 at 2:00 p.m. The purpose of the call is to discuss when a settlement conference is most likely to be productive. Plaintiff's counsel shall initiate the conference call and shall have opposing counsel on the line when calling chambers at (860) 240 3605. PLEASE NOTE THE CHANGE IN DATE AND TIME. (Constantine, A.) (Entered: 01/09/2009)
01/20/2009	14		Minute Entry for proceedings held before Judge Donna F. Martinez: Telephonic Status Conference held on 1/20/2009. (40 minutes) (Glynn, T.) (Entered: 01/21/2009)
01/23/2009	<u>15</u>	<input type="checkbox"/> 33.53KB	Settlement conference order and calendar: A settlement conference is scheduled for 2/6/09 at 1:00 p.m. with Judge Martinez, U.S. District Court,








			Room 262, 450 Main Street, Hartford, CT. All persons entering the courthouse must present photo identification. See attached order for important instructions. Signed by Judge Donna F. Martinez on 1/23/09. (Constantine, A.) (Entered: 01/23/2009)
01/23/2009			Set Deadlines/Hearings: Settlement Conference set for 2/6/2009 @ 01:00 PM in Chambers Room 262, 450 Main St., Hartford, CT before Judge Donna F. Martinez (Glynn, T.) (Entered: 01/26/2009)
02/06/2009	16		Minute Entry for proceedings held before Judge Donna F. Martinez: Settlement Conference held on 2/6/2009. Case did not settle. Total Time: 2 hours and 30 minutes (Martinez, Donna) (Entered: 02/06/2009)
02/27/2009	17	 16.82KB	NOTICE of Appearance by Thomas R. Gerarde on behalf of Johnmichael O'Hare, Anthony Pia (Gerarde, Thomas) (Entered: 02/27/2009)
03/20/2009	18	 53.14KB	MOTION to Amend/Correct 6 Answer to Complaint by Johnmichael O'Hare, Anthony Pia.Responses due by 4/10/2009 (Attachments: # 1 Amended Answer and Affirmative Defenses)(Gerarde, Thomas) (Entered: 03/20/2009)
03/25/2009	19	 29.09KB	ENTERED IN ERROR . . . <i>Amended</i> ANSWER to 1 Complaint with Affirmative Defenses by City of Hartford.(Feola-Guerrieri, Nathalie) Modified on 3/26/2009 (Grady, B.). (Entered: 03/25/2009)
03/25/2009	20	 62.72KB	MOTION to Amend/Correct <i>Answer and Affirmative Defenses</i> by City of Hartford.Responses due by 4/15/2009 (Feola-Guerrieri, Nathalie) (Additional attachment(s) added on 3/26/2009: # 1 Amended Answer and Affirmative Defenses) (Grady, B.). (Entered: 03/25/2009)
03/26/2009	21	 42.54KB	Docket Entry Correction: Document 20 MOTION to Amend Answer and Affirmative Defenses has been modified to add the amended answer and affirmative defenses. (Grady, B.) (Entered: 03/26/2009)
03/27/2009	22	 18.52KB	First MOTION for Extension of Time until April 20, 2009 to Respond to Interrogatories and Request for Production by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 03/27/2009)
03/31/2009	23	 9.65KB	Joint STATUS REPORT by Glen Harris, City of Hartford, Johnmichael O'Hare, Anthony Pia (Schoenhorn, Jon). Modified on 4/1/2009 to add filers (Montgomery, A.). (Entered: 03/31/2009)
03/31/2009	24	 33.19KB	ORDER granting 22 Motion for Extension of Time to 4/20/09 to respond to Discovery requests. Signed by Judge Robert N. Chatigny on 3/31/09. (Montgomery, A.) (Entered: 04/01/2009)
04/01/2009	25		ENTERED IN ERROR...NOTICE by Glen Harris <i>of Requests for Admission directed at Defendant O'Hare</i> (Schoenhorn, Jon) Modified on 4/2/2009 (Montgomery, A.). (Entered: 04/01/2009)
04/01/2009	26		ENTERED IN ERROR...NOTICE by Glen Harris <i>of Service of Requests for Admission directed at Defendant Pia</i> (Schoenhorn, Jon) Modified on 4/2/2009 (Montgomery, A.). (Entered: 04/01/2009)
04/01/2009	27	 18.47KB	First MOTION for Extension of Time until June 1, 2009 to Respond to Request for Admissions by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 04/01/2009)

04/02/2009			Docket Entry Correction...Documents 26 Notice & 25 Notice Entered in error - Per the local rules, discovery is not to be filed. (Montgomery, A.) (Entered: 04/02/2009)
04/02/2009	28		ORDER re 27 First MOTION for Extension of Time until June 1, 2009 to Respond to Request for Admissions. Granted. So ordered. Signed by Judge Robert N. Chatigny on 4/2/09. (S-Blue, A.) (Entered: 04/03/2009)
04/07/2009	29	 29.52KB	MOTION for Extension of Time until May 12, 2009 Responses to Interrogatories and Requests for Production by Glen Harris. (Schoenhorn, Jon) (Entered: 04/07/2009)
04/20/2009	30	 10.99KB	ENTERED IN ERROR...SEE DOCUMENT ENTRY #31...NOTICE of Appearance by Alan Raymond Dembiczak on behalf of Johnmichael O'Hare, Anthony Pia (Dembiczak, Alan) Modified on 4/21/2009 (Montgomery, A.). (Entered: 04/20/2009)
04/20/2009	31	 10.90KB	NOTICE of Appearance by Alan Raymond Dembiczak on behalf of Johnmichael O'Hare, Anthony Pia (Dembiczak, Alan) (Entered: 04/20/2009)
04/22/2009	32	 0.53MB	LETTER MOTION for Pre-filing Conference by Johnmichael O'Hare, Anthony Pia, City of Hartford. (Montgomery, A.) (Entered: 04/22/2009)
04/22/2009	33	 14.38KB	ORDER re: 32 Motion for Conference. Defendants' counsel may file the proposed summary judgment motion on or before June 30, 2009 without a prefiling conference. Signed by Judge Robert N. Chatigny on 4/22/09. (Montgomery, A.) (Entered: 04/22/2009)
04/22/2009	34	 35.68KB	ORDER granting 29 Motion for Extension of Time to 5/12/09 to respond to Discovery requests. Signed by Judge Robert N. Chatigny on 4/22/09. (Montgomery, A.) (Entered: 04/22/2009)
04/22/2009			Set Deadlines/Hearings: Dispositive Motions due by 6/30/2009 (Montgomery, A.) (Entered: 04/23/2009)
04/28/2009	35	 9.81KB	MOTION for Extension of Time <i>Re</i> Discovery and Dispositive Motions Set Deadlines/Hearings, 11 Scheduling Order, by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 04/28/2009)
04/30/2009	36		ORDER re 35 Motion for Extension of Time until 6/31/09 for discovery and until 7/30/09 to file dispositive motions. Granted. So ordered. Signed by Judge Robert N. Chatigny on 4/29/09. (Gothers, M.) (Entered: 05/01/2009)
05/04/2009			Set Deadlines/Hearings: Discovery due by 6/30/2009; Dispositive Motions due by 7/30/2009. (Walker, J.) (Entered: 05/04/2009)
05/07/2009	37		ENDORSEMENT ORDER granting 18 Motion to Amend Answer and Affirmative Defenses. Granted. Defendants Johnmichael O'Hare and Anthony Pia are directed to e-file their amended answer and affirmative defenses. So ordered. Signed by Judge Robert N. Chatigny on 5/5/09. (Walker, J.) (Entered: 05/07/2009)
05/07/2009	38		ENDORSEMENT ORDER granting 20 Motion to Amend Answer and Affirmative Defenses. Granted. The defendant, City of Hartford, is directed to e-file the amended answer and affirmative defenses. So ordered. Signed by Judge Robert N. Chatigny on 5/5/09. (Walker, J.) (Entered: 05/07/2009)

05/08/2009	39	<input type="checkbox"/> 30.22KB	AMENDED ANSWER to <i>complaint</i> with Affirmative Defenses. by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 05/08/2009)
05/08/2009	40	<input type="checkbox"/> 29.09KB	<i>Amended</i> ANSWER to 1 Complaint with Affirmative Defenses by City of Hartford.(Feola-Guerrieri, Nathalie) (Entered: 05/08/2009)
06/24/2009	41	<input type="checkbox"/> 11.41KB	Joint STATUS REPORT by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 06/24/2009)
07/21/2009	42	<input type="checkbox"/> 13.85KB	Second MOTION for Extension of Time <i>re</i> Deadline for Dispositive Motions by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 07/21/2009)
07/23/2009	43		ENDORSEMENT ORDER granting 42 Motion for Extension of Time until 8/10/09 to file dispositive motions. Granted. So ordered. Signed by Judge Robert N. Chatigny on 7/22/09. (Walker, J.) (Entered: 07/23/2009)
07/23/2009			Set Deadlines/Hearings: Dispositive Motions due by 8/10/2009 (Walker, J.) (Entered: 07/23/2009)
08/10/2009	44	<input type="checkbox"/> 137.30KB	MOTION for Summary Judgment by City of Hartford.Responses due by 8/31/2009 (Attachments: # 1 Memorandum in Support of City of Hartford's Motion for Summary Judgment, # 2 Statement of Material Facts in Support of City of Hartford Motion for Summary Judgment, # 3 Exhibit A)(Feola-Guerrieri, Nathalie) (Entered: 08/10/2009)
08/10/2009	45	<input type="checkbox"/> 2.99MB	MOTION for Summary Judgment by Glen Harris.Responses due by 8/31/2009 (Attachments: # 1 Statement of Material Facts, # 2 Exhibit List, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6, # 9 Exhibit 7, # 10 Exhibit 8, # 11 Exhibit 9, # 12 Exhibit 10, # 13 Exhibit 11, # 14 Exhibit 12, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15, # 18 Exhibit 16, # 19 Exhibit 17, # 20 Memorandum in Support)(Schoenhorn, Jon) (Entered: 08/10/2009)
08/10/2009	46	<input type="checkbox"/> 19.01KB	MOTION for Summary Judgment by Johnmichael O'Hare, Anthony Pia.Responses due by 8/31/2009 (Dembiczak, Alan) (Entered: 08/10/2009)
08/10/2009	47	<input type="checkbox"/> 159.92KB	Memorandum in Support re 46 MOTION for Summary Judgment filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 08/10/2009)
08/10/2009	48	<input type="checkbox"/> 7.33MB	Statement of Material Facts re 46 MOTION for Summary Judgment filed by Johnmichael O'Hare, Anthony Pia. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit D1, # 6 Exhibit E, # 7 Exhibit E1, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit J, # 13 Exhibit K, # 14 Exhibit L, # 15 Exhibit M)(Dembiczak, Alan) (Entered: 08/10/2009)
08/31/2009	49	<input type="checkbox"/> 34.70KB	Memorandum in Opposition re 45 MOTION for Summary Judgment filed by City of Hartford. (Attachments: # 1 Statement of Material Facts)(Feola-Guerrieri, Nathalie) (Entered: 08/31/2009)
08/31/2009	50	<input type="checkbox"/> 0.65MB	OBJECTION re 48 Statement of Material Facts, 46 MOTION for Summary Judgment, 44 MOTION for Summary Judgment, 47 Memorandum in Support of Motion filed by Glen Harris. (Attachments: # 1 Memorandum in Support, # 2 Statement of Material Facts, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6

			Exhibit)(Schoenhorn, Jon) (Entered: 08/31/2009)
08/31/2009	51	<input type="checkbox"/> 42.29KB	WITHDRAWN - SEE ORDER 55. Memorandum in Opposition to Pltff's Motion for Partial Summary Judgment re 45 MOTION for Summary Judgment filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) Modified on 9/4/2009 in accordance with order 55. (Walker, J.). (Entered: 08/31/2009)
08/31/2009	52	<input type="checkbox"/> 14.72KB	MOTION to Withdraw <i>Docket No. 51 Memo in Oppo toPltff's Motion for Parial Summary Judgment 08-31-09</i> by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Corrected PDF added on 9/2/2009: # 1 MAIN DOCUMENT) (D'Onofrio, B.). Modified on 9/2/2009 (D'Onofrio, B.). (Entered: 08/31/2009)
08/31/2009	53	<input type="checkbox"/> 62.27KB	Memorandum in Opposition re 45 MOTION for Summary Judgment filed by Johnmichael O'Hare, Anthony Pia. (Attachments: # 1 Supplement Resp to Pltff's Local Rule 56(a)(1) Stmt of Material Facts Not in Dispute)(Dembiczak, Alan) (Entered: 08/31/2009)
09/02/2009	54	<input type="checkbox"/> 14.72KB	Docket Entry Correction re 52 MOTION to Withdraw <i>Docket No. 51 Memo in Oppo toPltff's Motion for Parial Summary Judgment 08-31-09</i> , 51 Memorandum in Opposition to Motion. Document 52 modified to correct PDF. (D'Onofrio, B.) (Entered: 09/02/2009)
09/04/2009	55		ENDORSEMENT ORDER granting 52 Motion to Withdraw 51 Memorandum in Opposition to Motion. Granted. So ordered. Signed by Judge Robert N. Chatigny on 9/4/09. (Walker, J.) (Entered: 09/04/2009)
09/10/2009	56	<input type="checkbox"/> 70.32KB	REPLY to Response to 45 MOTION for Summary Judgment filed by Glen Harris. (Schoenhorn, Jon) (Entered: 09/10/2009)
09/10/2009	57	<input type="checkbox"/> 0.82MB	REPLY to Response to 46 MOTION for Summary Judgment filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 09/10/2009)
09/11/2009	58	<input type="checkbox"/> 58.06KB	MOTION to Strike 57 Reply to Response to Motion by Glen Harris.Responses due by 10/2/2009 (Schoenhorn, Jon) (Entered: 09/11/2009)
09/11/2009	59	<input type="checkbox"/> 13.72KB	REPLY to Response to 44 MOTION for Summary Judgment filed by City of Hartford. (Feola-Guerrieri, Nathalie) (Entered: 09/11/2009)
09/23/2009	60	<input type="checkbox"/> 31.32KB	OBJECTION re 58 MOTION to Strike 57 Reply to Response to Motion filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 09/23/2009)
09/24/2009	61	<input type="checkbox"/> 15.37KB	STATUS REPORT by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 09/24/2009)
09/28/2009	62	<input type="checkbox"/> 48.93KB	REPLY to Response to 58 MOTION to Strike 57 Reply to Response to Motion filed by Glen Harris. (Schoenhorn, Jon) (Entered: 09/28/2009)
12/23/2009	63	<input type="checkbox"/> 15.33KB	Joint STATUS REPORT by Glen Harris, Johnmichael O'Hare, Anthony Pia, City of Hartford. (Dembiczak, Alan) (Entered: 12/23/2009)
01/28/2010	64	<input type="checkbox"/> 37.47KB	NOTICE OF ADDITIONAL AUTHORITY by Glen Harris re 50 Objection, 45 MOTION for Summary Judgment filed by Glen Harris. (Schoenhorn, Jon) (Entered: 01/28/2010)

03/24/2010			NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE.ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Telephone Conference set for 3/26/2010 02:30 PM before Judge Robert N. Chatigny. Counsel will initiate the conference call to chambers at 860-240-3659 with all counsel on the line. (Glynn, T.) (Entered: 03/24/2010)
03/24/2010			AMENDED NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE.ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Oral Argument on Motions for Summary Judgment set for 3/26/2010 02:30 PM in Courtroom Three, 450 Main St., Hartford, CT before Judge Robert N. Chatigny (Glynn, T.) (Entered: 03/24/2010)
03/26/2010	65	 169.88KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Motion Hearing held on 3/26/2010 re 46 MOTION for Summary Judgment filed by Johnmichael O'Hare, Anthony Pia, 44 MOTION for Summary Judgment filed by City of Hartford, 45 MOTION for Summary Judgment filed by Glen Harris.Oral order denying 44 Motion for Summary Judgment; denying 45 Motion for Summary Judgment; denying 46 Motion for Summary Judgment. Total Time: 1 hours and 45 minutes (Court Reporter Darlene Warner.) (Walker, J.) (Entered: 03/26/2010)
03/29/2010	66		ORDER: A conference call is scheduled for Monday, 4/5/10 at 1:00 p.m. with Judge Martinez. Plaintiff's counsel shall initiate the conference call and shall have opposing counsel on the line when calling chambers at (860) 240 3605. Signed by Judge Donna F. Martinez on 3/29/10. (Constantine, A.) (Entered: 03/29/2010)
03/29/2010	67		ORDER: The time of the conference call scheduled for Monday, 4/5/10 is changed from 1:00 p.m. to 3:00 p.m.(Constantine, A.) (Entered: 03/29/2010)
03/29/2010			Set Deadlines/Hearings: Telephonic Status Conference set for 4/5/2010 at 3:00 PM before Judge Donna F. Martinez (Wood, R.) (Entered: 03/30/2010)
04/06/2010	68		ORDER denying 58 Motion to Strike. Denied as moot. Defense counsel withdrew "Defendants' Local Rule 56(a)(2) Statement in Reply to Plaintiffs' Objection to Defendants' Motion for Summary Judgment" at oral argument on March 26, 2010. So ordered. Signed by Judge Robert N. Chatigny on 04/05/2010. (Swan, N.) (Entered: 04/06/2010)
04/08/2010	69	 33.53KB	Settlement Conference Order and calendar: A settlement conference is scheduled with Judge Martinez on 5/27/10 at 1:00 p.m. See attached order for instructions. (Constantine, A.) (Entered: 04/08/2010)
04/08/2010			Set Deadlines/Hearings: Settlement Conference set for 5/27/2010 at 1:00 PM in Chambers Room 262, 450 Main St., Hartford, CT before Judge Donna F. Martinez (Wood, R.) (Entered: 04/12/2010)
05/27/2010	70		Minute Entry for proceedings held before Judge Donna F. Martinez: Settlement Conference held on 5/27/2010. Case did not settle. If counsel agree that another conference is likely to be productive they may request one by contacting Judge Martinez's chambers. Total Time: 2 hours and 30 minutes (Martinez, Donna) (Entered: 05/27/2010)

05/28/2010	71	 12.60KB	MOTION for Scheduling Conference by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 05/28/2010)
06/07/2010	72	 84.95KB	MOTION to Preclude Plaintiff's Experts Deering & Eiswirth by Johnmichael O'Hare, Anthony Pia. Responses due by 6/28/2010 (Attachments: # 1 Exhibit A)(Dembiczak, Alan) (Entered: 06/07/2010)
06/08/2010	73		ORDER granting 71 Motion for Conference. A telephone conference is scheduled for June 11, 2010, at 10:00 am. Defendants' counsel will initiate the call. Signed by Judge Robert N. Chatigny on 6/8/10. (Macare, L.) (Entered: 06/08/2010)
06/08/2010			NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE. Telephone Scheduling Conference set for 6/11/2010 10:00 AM before Judge Robert N. Chatigny. Defendants' counsel will initiate the call and call chambers last at (860) 240-3659. (Macare, L.) (Entered: 06/08/2010)
06/08/2010	74	 15.97KB	MOTION to Preclude Plaintiff's Experts Deering and Eisworth by City of Hartford. Responses due by 6/29/2010 (Feola-Guerrieri, Nathalie) (Entered: 06/08/2010)
06/10/2010	75	 0.59MB	Memorandum in Opposition re 72 MOTION to Preclude Plaintiff's Experts Deering & Eiswirth, 74 MOTION to Preclude Plaintiff's Experts Deering and Eisworth filed by Glen Harris. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6)(Schoenhorn, Jon) (Entered: 06/10/2010)
06/11/2010	76	 168.36KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Telephone Status Conference held on 6/11/2010. 10 minutes(Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 06/11/2010)
06/11/2010			Set Deadlines/Hearings: Jury Selection set for 11/9/2010 at 09:00 AM in Courtroom Three, 450 Main St., Hartford, CT before Judge Robert N. Chatigny. Trial dates to be determined. (Glynn, T.) (Entered: 06/11/2010)
06/11/2010	77	 25.94KB	ORDER REFERRING CASE to Magistrate Judge Donna F. Martinez to establish a schedule for the filing of the joint trial memoranda including 72 MOTION to Preclude Plaintiff's Experts Deering & Eiswirth, 74 MOTION to Preclude Plaintiff's Experts Deering and Eisworth. Signed by Judge Robert N. Chatigny on 6/11/10. Motions referred to Donna F. Martinez(Glynn, T.) (Entered: 06/11/2010)
06/17/2010	78	 20.74KB	RESPONSE re 75 Memorandum in Opposition to 72 Motion to Preclude filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan). (Entered: 06/17/2010)
08/10/2010	79		ORDER: Oral argument on the defendants' motions to preclude (doc. 72, 74) is scheduled for 8/17/10 at 2:00 p.m. before Judge Martinez in the East Courtroom.(Constantine, A.) (Entered: 08/10/2010)
08/10/2010			Set Deadlines/Hearings: Oral Argument Hearing set for 8/17/2010 at 2:00 PM in East Courtroom, 450 Main St., Hartford, CT before Judge Donna F. Martinez (Wood, R.) (Entered: 08/11/2010)

08/16/2010	80	<input type="checkbox"/> 184.17KB	Amended EXHIBIT <i>A</i> by Johnmichael O'Hare, Anthony Pia re 72 MOTION to Preclude Plaintiff's Experts Deering & Eiswirth. (Dembiczak, Alan) (Entered: 08/16/2010)
08/17/2010	81	<input type="checkbox"/> 240.15KB	Minute Entry. Proceedings held before Judge Donna F. Martinez: taking under advisement 72 Motion to Preclude; taking under advisement 74 Motion to Preclude; Motion Hearing held on 8/17/2010 re 72 MOTION to Preclude Plaintiff's Experts Deering & Eiswirth filed by Johnmichael O'Hare, Anthony Pia, 74 MOTION to Preclude Plaintiff's Experts Deering and Eiswirth filed by City of Hartford. 55 minutes(Court Reporter FTR.) (Gothers, M.) (Entered: 08/19/2010)
08/19/2010	82	<input type="checkbox"/> 46.18KB	ORDER: The defendants' motions to preclude (doc. 72 74) are denied. Applying the factors set forth in <i>Softel, Inc. v. Dragon Med. & Scientific Communications</i> , 118 F.3d 955, 961 (2d Cir. 1997), the first factor - the plaintiffs' explanation - weighs in favor of preclusion. However, the remaining factors - the importance of the testimony, the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony and the possibility of a continuance - all weigh against preclusion. The proposed testimony, especially that of Dr. Eiswerth, is not new to the defendants (having been disclosed on 4/15/09) and is critical to the plaintiffs' case. No trial date has been set and any prejudice to the defendants can be cured through an adjustment to the scheduling order to permit them to depose the experts and possibly retain a rebuttal expert. Having considered the foregoing factors, and mindful that "[e]ven in the face of missed deadlines, excluding expert testimony can frustrate the Federal Rules' overarching objective of doing substantial justice to litigants," <i>Sealed Plaintiff No. 1 v. Sealed Defendant No. 1</i> , 221 F.R.D. 367, 369 (N.D.N.Y. 2004), the court finds that the "drastic remedy" of preclusion is not warranted in this case. <i>Outley v. City of New York</i> , 837 F.2d 587, 590 (2d Cir. 1988). See attached amended scheduling order. Signed by Judge Donna F. Martinez on 8/19/10. (Constantine, A.) (Entered: 08/19/2010)
08/19/2010			Set Deadlines/Hearings: Trial Brief due by 12/31/2010 Trial Ready Date as of January 2011 (Constantine, A.) (Entered: 08/19/2010)
09/15/2010	83	<input type="checkbox"/> 25.17KB	MOTION for Extension of Time to Modify Scheduling Order by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 09/15/2010)
09/16/2010	84	<input type="checkbox"/> 59.65KB	OBJECTION re 83 MOTION for Extension of Time to Modify Scheduling Order filed by Glen Harris. (Schoenhorn, Jon) (Entered: 09/16/2010)
09/17/2010	85		ORDER granting 83 Motion for Extension of Time. Signed by Judge Donna F. Martinez on 9/17/10. (Constantine, A.) (Entered: 09/17/2010)
11/02/2010	86		ORDER : The parties' Joint Trial Memorandum shall be filed by 12/31/10. Jury selection will be scheduled at a date to be determined. (Constantine, A.) (Entered: 11/02/2010)
11/02/2010			Set Deadlines/Hearings: Trial Brief due by 12/31/2010 (Blue, A.) (Entered: 11/03/2010)
12/30/2010	87	<input type="checkbox"/> 15.06KB	MOTION for Extension of Time until January 7, 2011 to file the Joint Trial Memorandum by Glen Harris, City of Hartford, Johnmichael O'Hare, Anthony

			Pia. (Gerarde, Thomas) (Entered: 12/30/2010)
01/07/2011	88	<input type="checkbox"/> 16.90KB	MOTION to Bifurcate by City of Hartford.Responses due by 1/28/2011 (Feola-Guerrieri, Nathalie) (Entered: 01/07/2011)
01/07/2011	89	<input type="checkbox"/> 0.69MB	TRIAL MEMO (Joint) by Glen Harris, City of Hartford, Johnmichael O'Hare, Anthony Pia Estimated trial time 4-6 Days. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Gerarde, Thomas) . (Entered: 01/07/2011)
01/10/2011	90		ORDER finding as moot 87 Motion for Extension of Time. Signed by Judge Robert N. Chatigny on 1/10/11. (Macare, L.) (Entered: 01/10/2011)
01/18/2011	91	<input type="checkbox"/> 62.21KB	Memorandum in Opposition re 88 MOTION to Bifurcate filed by Glen Harris. (Schoenhorn, Jon) (Entered: 01/18/2011)
09/29/2011	92	<input type="checkbox"/> 33.18KB	ORDER denying 88 Motion to Bifurcate. Signed by Judge Robert N. Chatigny on 09/28/11. (Wittlin, M.) (Entered: 09/29/2011)
01/20/2012			NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE.ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Final Pretrial Conference set for 4/20/2012 10:00 AM in Courtroom Three, 450 Main St., Hartford, CT before Judge Robert N. Chatigny. (Rickevicius, L.) (Entered: 01/20/2012)
01/20/2012			NOTICE OF E-FILED CALENDAR: THIS IS THE ONLY NOTICE COUNSEL/THE PARTIES WILL RECEIVE.ALL PERSONS ENTERING THE COURTHOUSE MUST PRESENT PHOTO IDENTIFICATION. Jury Selection set for 5/8/2012 at 9:00 AM in Courtroom Three, 450 Main St., Hartford, CT before Judge Robert N. Chatigny. (Rickevicius, L.) (Entered: 01/20/2012)
04/20/2012	93	<input type="checkbox"/> 127.29KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Final Pretrial Conference held on 4/20/2012. Total Time: 1 hour and 18 minutes(Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 04/20/2012)
05/04/2012	94	<input type="checkbox"/> 346.26KB	TRIAL MEMO (Joint) and (Amended) by Glen Harris, City of Hartford, Johnmichael O'Hare, Anthony Pia Estimated trial time 4 - 6 Days. (Attachments: # 1 Exhibit E (Amended), # 2 Exhibit I (Amended))(Gerarde, Thomas) (Entered: 05/04/2012)
05/08/2012	95	<input type="checkbox"/> 100.23KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Jury Selection held on 5/8/2012. Jury Trial set for 5/21/2012 at 9:00 AM in Courtroom Three, 450 Main St., Hartford, CT before Judge Robert N. Chatigny. Total Time: 3 hours (Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/08/2012)
05/18/2012	96	<input type="checkbox"/> 10.76KB	OBJECTION re 94 Trial Memo <i>Supplemental Proposed Jury Instructions by Defendants</i> filed by Glen Harris. (Schoenhorn, Jon) (Entered: 05/18/2012)
05/21/2012	97	<input type="checkbox"/> 71.97KB	RESPONSE re 96 Objection re 94 Plaintiff's Supplemental Jury Instructions filed by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) Modified on 5/23/2012 to edit text to link document. (Blue, A.). (Entered: 05/21/2012)





05/21/2012	98	<input type="checkbox"/> 201.29KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Jury Trial held on 5/21/2012. Jury Trial Continued Until 5/22/12 @ 9:00 a.m.. Total Time: 6 hours and 20 minutes(Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/21/2012)
05/22/2012	99	<input type="checkbox"/> 200.12KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Jury Trial held on 5/22/2012. Jury Trial Continued Until 5/23/12 at 9:00 a.m.. Total Time: 5 hours and 50 minutes(Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/23/2012)
05/23/2012	100	<input type="checkbox"/> 200.12KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Jury Trial held on 5/23/2012. Jury Trial Continued Until 5/24/12 @ 9:00 a.m.. Total Time: 6 hours and 25 minutes(Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/24/2012)
05/24/2012	101	<input type="checkbox"/> 77.26KB	Proposed Jury Instructions by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 05/24/2012)
05/24/2012	102		ORAL MOTION for Judgment as a Matter of Law by Johnmichael O'Hare, Anthony Pia. (Glynn, T.) (Entered: 05/25/2012)
05/24/2012	103		ORAL MOTION for Judgment as a Matter of Law by Glen Harris. (Glynn, T.) (Entered: 05/25/2012)
05/24/2012	104	<input type="checkbox"/> 202.16KB	Minute Entry. Proceedings held before Judge Robert N. Chatigny: taking under advisement 102 ORAL Motion for Judgment as a Matter of Law; taking under advisement 103 ORAL Motion for Judgment as a Matter of Law; Jury Trial held on 5/24/2012. Jury Trial Continued Until 5/25/12 @ 9:30 a.m.. Total Time: 5 hours and 19 minutes (Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/25/2012)
05/25/2012	105	<input type="checkbox"/> 200.53KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Jury Trial held on 5/25/2012. Jury Trial Continued Until 5/29/12 @ 9:00 a.m.. Total Time: 4 hours and 53 minutes (Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/25/2012)
05/29/2012	106	<input type="checkbox"/> 200.81KB	Minute Entry for proceedings held before Judge Robert N. Chatigny: Jury Trial completed on 5/29/2012. Total Time: 1 hour and 14 minutes(Court Reporter Warner, Darlene.) (Glynn, T.) (Entered: 05/31/2012)
05/29/2012	107	<input type="checkbox"/> 42.81KB	Witness List by Glen Harris. (Glynn, T.) (Entered: 05/31/2012)
05/29/2012	108	<input type="checkbox"/> 267.52KB	Marked Exhibit List by Glen Harris. (Glynn, T.) (Entered: 05/31/2012)
05/29/2012	109	<input type="checkbox"/> 42.44KB	Witness List by Johnmichael O'Hare, Anthony Pia. (Glynn, T.) (Entered: 05/31/2012)
05/29/2012	110	<input type="checkbox"/> 217.06KB	Marked Exhibit List by Johnmichael O'Hare, Anthony Pia. (Glynn, T.) (Entered: 05/31/2012)
05/29/2012	111	<input type="checkbox"/> 42.62KB	Court Exhibit List. (Glynn, T.) (Entered: 05/31/2012)
05/29/2012	112	<input type="checkbox"/> 256.92KB	JURY VERDICT For Defendants Johnmichael O'Hare and Anthony Pia against Plaintiff Glen Harris. (Glynn, T.) (Entered: 05/31/2012)

05/29/2012	113	<input type="checkbox"/> 53.89KB	JURY VERDICT - Special Interrogatories. (Glynn, T.) (Entered: 05/31/2012)
06/12/2012	114		Acknowledgment of Receipt of Trial Exhibits 1-26 filed by Johnmichael O'Hare, Anthony Pia. (Glynn, T.) (Entered: 06/13/2012)
06/21/2012	115	<input type="checkbox"/> 17.07KB	MOTION for Judgment (<i>Renewed based on Qualified Immunity</i>) by Johnmichael O'Hare, Anthony Pia. Responses due by 7/12/2012 (Gerarde, Thomas) (Entered: 06/21/2012)
06/21/2012	116	<input type="checkbox"/> 121.61KB	Memorandum in Support re 115 MOTION for Judgment (<i>Renewed based on Qualified Immunity</i>) filed by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 06/21/2012)
06/26/2012	117	<input type="checkbox"/> 159.02KB	MOTION for Judgment NOV (Responses due by 7/17/2012,), MOTION for Judgment as a Matter of Law (Responses due by 7/17/2012,), MOTION for New Trial by Glen Harris. (Attachments: # 1 Memorandum in Support of Motion NOV, Motion for Judgment as Matter of Law & Motion for New Trial) (Schoenhorn, Jon) (Entered: 06/26/2012)
07/03/2012	118	<input type="checkbox"/> 490.85KB	BILL OF COSTS by Johnmichael O'Hare, Anthony Pia. (Attachments: # 1 Exhibit A)(Dembiczak, Alan) (Entered: 07/03/2012)
07/06/2012	119	<input type="checkbox"/> 1.20MB	OBJECTION re 116 Memorandum in Support of Motion, 115 MOTION for Judgment (<i>Renewed based on Qualified Immunity</i>) filed by Glen Harris. (Attachments: # 1 Memorandum in Support of Objection to Defendants' Rule 50 Motion)(Schoenhorn, Jon) (Entered: 07/06/2012)
07/16/2012	120	<input type="checkbox"/> 109.39KB	Memorandum in Opposition re 117 MOTION for Judgment NOV MOTION for Judgment as a Matter of Law MOTION for New Trial filed by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 07/16/2012)
07/16/2012	121	<input type="checkbox"/> 24.36KB	Memorandum in Support re 115 MOTION for Judgment (<i>Renewed based on Qualified Immunity</i>) filed by Johnmichael O'Hare, Anthony Pia. (Gerarde, Thomas) (Entered: 07/16/2012)
07/20/2012	122		ORDER allowing 118 Bill of Costs filed by Johnmichael O'Hare, Anthony Pia in the amount of \$2,427.02. Pursuant to Local Rule 54(d), the parties may appeal this decision to the presiding judge on or before August 3, 2012. Signed by Clerk on 7/20/2012. (Thomas, D.) (Entered: 07/20/2012)
07/20/2012	123	<input type="checkbox"/> 0.59MB	MOTION to Appeal 122 Order awarding Defendants' Bill of Costs filed by Glen Harris. (Schoenhorn, Jon) Modified on 7/24/2012 to edit text to add motion relief. (Blue, A.). (Entered: 07/20/2012)
07/20/2012			Set/Reset Deadlines as to 123 MOTION for Reconsideration. Responses due by 8/14/2012 (Blue, A.) (Entered: 07/24/2012)
07/24/2012	124	<input type="checkbox"/> 15.06KB	REPLY to Response to 123 MOTION for Reconsideration (<i>Obj to P's Motion to Appeal the Clerk's Ruling Granting D's Bill of Costs</i>) filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) (Entered: 07/24/2012)
07/25/2012	125	<input type="checkbox"/> 0.61MB	RESPONSE re 120 Memorandum in Opposition to 117 Motion filed by Glen Harris. (Schoenhorn, Jon) Modified on 7/27/2012 to edit text to link document. (Blue, A.). (Entered: 07/25/2012)

07/26/2012	126	<input type="checkbox"/> 0.61MB	REPLY to Response to 117 MOTION for Judgment NOV MOTION for Judgment as a Matter of Law MOTION for New Trial <i>AMENDED</i> filed by Glen Harris. (Schoenhorn, Jon) (Entered: 07/26/2012)
08/31/2012	127		ORDER vacating without prejudice re 122 , the clerk's order allowing bill of costs. As post-trial motions have not yet been resolved, the judgment is not yet final. Signed by Judge Robert N. Chatigny on 8/31/12. (Goldsticker, M) (Entered: 08/31/2012)
08/31/2012	128		ORDER granting 123 Motion for Reconsideration. Signed by Judge Robert N. Chatigny on 8/31/12. (Goldsticker, M) (Entered: 08/31/2012)
09/27/2012	129	<input type="checkbox"/> 33.21KB	ORDER denying as moot 115 Motion for Judgment; denying 117 Motion for Judgment NOV; denying 117 Motion for Judgment as a Matter of Law; denying 117 Motion for New Trial. Signed by Judge Robert N. Chatigny on 9/27/12. (Goldsticker, M) (Entered: 09/27/2012)
09/28/2012	130		ORDER denying as moot 102 Motion for Judgment as a Matter of Law. Signed by Judge Robert N. Chatigny on 9/28/2012. (Rickevicius, L.) (Entered: 09/28/2012)
09/28/2012	131		ORDER denying as moot 103 Motion for Judgment as a Matter of Law. Signed by Judge Robert N. Chatigny on 9/28/2012. (Rickevicius, L.) (Entered: 09/28/2012)
09/28/2012	132	<input type="checkbox"/> 29.00KB	JUDGMENT entered in favor of Anthony Pia, City of Hartford, Johnmichael O'Hare against Glen Harris. For Appeal Forms please go to the following website: http://www.ctd.uscourts.gov/forms.html . Signed by Clerk on 9/28/12. (Glynn, T.) (Entered: 09/28/2012)
09/28/2012			JUDICIAL PROCEEDINGS SURVEY: The following link to the confidential survey requires you to log into CM/ECF for SECURITY purposes. Once in CM/ECF you will be prompted for the case number. Although you are receiving this survey through CM/ECF, it is hosted on an independent website called SurveyMonkey. Once in SurveyMonkey, the survey is located in a secure account. The survey is not docketed and it is not sent directly to the judge. To ensure anonymity, completed surveys are held up to 90 days before they are sent to the judge for review. We hope you will take this opportunity to participate, please click on this link: https://ecf.ctd.uscourts.gov/cgi-bin/Dispatch.pl?survey (Glynn, T.) (Entered: 09/28/2012)
10/03/2012	133	<input type="checkbox"/> 219.37KB	BILL OF COSTS by Johnmichael O'Hare, Anthony Pia. (Attachments: # 1 Exhibit A and B (1-4))(Dembiczak, Alan) (Entered: 10/03/2012)
10/23/2012	134	<input type="checkbox"/> 32.38KB	ORDER allowing in part 133 Bill of Costs filed by Johnmichael O'Hare, Anthony Pia in the amount of \$1,777.02. The parties may appeal this order to the presiding judge on or before November 6, 2012. Signed by Clerk on 10/23/2012. (Thomas, D.) (Entered: 10/23/2012)

10/24/2012	135	<input type="checkbox"/> 16.89KB	OBJECTION re 134 Order re 133 Bill of Costs, filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) Modified on 10/26/2012 to link document. (Blue, A.). (Entered: 10/24/2012)
10/25/2012	136	<input type="checkbox"/> 501.35KB	NOTICE OF APPEAL as to 132 Judgment by Glen Harris. Filing fee \$ 455, receipt number 0205-2669475. (Schoenhorn, Jon) (Entered: 10/25/2012)
10/26/2012	137	<input type="checkbox"/> 0.59MB	RESPONSE re 135 Objection to order 134 re: bill of costs 133 by Glen Harris. (Schoenhorn, Jon) Modified on 10/30/2012 to create links(Walker, J.). (Entered: 10/26/2012)
11/01/2012	138	<input type="checkbox"/> 18.11KB	RESPONSE re 137 Response to P's Obj. to Ruling on 133 Bill of Costs filed by Johnmichael O'Hare, Anthony Pia. (Dembiczak, Alan) Modified on 11/2/2012 to edit text to link document. (Blue, A.). (Entered: 11/01/2012)
11/08/2012	139		ORDER: The defendants have filed an objection 135 to the Court's Order of 10/23/2012 134 providing clarification related to Item 9 of the Bill of Costs. They do not cite an authority permitting the Court to approve the cost of an aerial fly over. The Court affirms it's previous Order. Signed by Judge Robert N. Chatigny on 11/8/2012. (Rickevicus, L.) (Entered: 11/08/2012)
12/11/2012	140	<input type="checkbox"/> 0.53MB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial, Vol. I. Held on 05.21.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/1/2013. Redacted Transcript Deadline set for 1/11/2013. Release of Transcript Restriction set for 3/11/2013. (Warner, D.) (Entered: 12/11/2012)
12/11/2012	141	<input type="checkbox"/> 94.99KB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial - Excerpt. Held on 05.22.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/1/2013. Redacted Transcript Deadline set for 1/11/2013. Release of Transcript Restriction set for 3/11/2013. (Warner, D.) (Entered: 12/11/2012)

12/11/2012	142	<input type="checkbox"/> 71.07KB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial Excerpt - Rule 50 Motion. Held on 05.24.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/1/2013. Redacted Transcript Deadline set for 1/11/2013. Release of Transcript Restriction set for 3/11/2013. (Warner, D.) (Entered: 12/11/2012)
12/11/2012	143	<input type="checkbox"/> 372.57KB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial - Argument and Charge. Held on 05.25.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/1/2013. Redacted Transcript Deadline set for 1/11/2013. Release of Transcript Restriction set for 3/11/2013. (Warner, D.) (Entered: 12/11/2012)
12/11/2012	144	<input type="checkbox"/> 110.30KB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial - Verdict. Held on 05.29.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/1/2013. Redacted Transcript Deadline set for 1/11/2013. Release of Transcript Restriction set for 3/11/2013. (Warner, D.) (Entered: 12/11/2012)

01/03/2013	145	 467.70KB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial, Vol. II. Held on 05.22.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/24/2013. Redacted Transcript Deadline set for 2/3/2013. Release of Transcript Restriction set for 4/3/2013. (Warner, D.) (Entered: 01/03/2013)
01/03/2013	146	 0.53MB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial, Vol. III. Held on 05.23.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/24/2013. Redacted Transcript Deadline set for 2/3/2013. Release of Transcript Restriction set for 4/3/2013. (Warner, D.) (Entered: 01/03/2013)
01/03/2013	147	 414.17KB	TRANSCRIPT of Proceedings: Type of Hearing: Jury Trial, Vol. IV. Held on 05.24.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 1/24/2013. Redacted Transcript Deadline set for 2/3/2013. Release of Transcript Restriction set for 4/3/2013. (Warner, D.) (Entered: 01/03/2013)
04/01/2013	148	 113.62KB	TRANSCRIPT of Proceedings: Type of Hearing: Pretrial Conference - Excerpt. Held on 04.20.12 before Judge Robert N. Chatigny. Court Reporter: Darlene A. Warner. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: To remove personal identifier information from the

			transcript, a party must electronically file a Notice of Intent to Request Redaction with the Clerk's Office within seven (7) calendar days of this date. If no such Notice is filed, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available through PACER without redaction 90 days from today's date. The transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. The policy governing the redaction of personal information is located on the court website at www.ctd.uscourts.gov. Redaction Request due 4/22/2013. Redacted Transcript Deadline set for 5/2/2013. Release of Transcript Restriction set for 6/30/2013. (Warner, D.) (Entered: 04/01/2013)
04/03/2013	149	<input type="checkbox"/> 41.32KB	"ENTERED IN ERROR" Index to Record on Appeal by Glen Harris re 136 Notice of Appeal. For docket entries without a hyperlink, contact the court to arrange for the document(s) to be made available to you. (Schoenhorn, Jon) Modified on 4/5/2013 (Blue, A.). (Entered: 04/03/2013)
04/03/2013	150	<input type="checkbox"/> 41.32KB	Index to Record on Appeal by Glen Harris re 136 Notice of Appeal, 98 Jury Trial - Held, 106 Jury Trial - Completed, 68 Order on Motion to Strike, 146 Transcript, 125 Response, 104 Order on Motion for Judgment as a Matter of Law, Jury Trial - Held, 57 Reply to Response to Motion, 145 Transcript, 148 Transcript, 48 Statement of Material Facts, 20 MOTION to Amend/Correct <i>Answer and Affirmative Defenses</i> , 130 Order on Motion for Judgment as a Matter of Law, 8 Report of Rule 26(f) Planning Meeting, 143 Transcript, 142 Transcript, 46 MOTION for Summary Judgment, 119 Objection, 93 Pretrial Conference, 97 Response, 121 Memorandum in Support of Motion, 21 Docket Annotation, 101 Proposed Jury Instructions/Request to Charge, 58 MOTION to Strike 57 Reply to Response to Motion, 56 Reply to Response to Motion, 94 Trial Memo, 18 MOTION to Amend/Correct 6 Answer to Complaint, 60 Objection, 65 Order on Motion for Summary Judgment, Motion Hearing, 102 MOTION for Judgment as a Matter of Law, 95 Jury Selection, 45 MOTION for Summary Judgment, 129 Order on Motion for Judgment, Order on Motion for Judgment NOV, Order on Motion for Judgment as a Matter of Law, Order on Motion for New Trial, 40 Answer to Complaint, 105 Jury Trial - Held, 96 Objection, 1 Complaint, 132 Judgment, 140 Transcript, 89 Trial Memo, 116 Memorandum in Support of Motion, 103 MOTION for Judgment as a Matter of Law, 49 Memorandum in Opposition to Motion, 144 Transcript, 39 Amended Answer to Complaint, 99 Jury Trial - Held, 115 MOTION for Judgment (<i>Renewed based on Qualified Immunity</i>), 147 Transcript, 126 Reply to Response to Motion, 6 Answer to Complaint, 50 Objection, 141 Transcript, 64 Notice of Additional Authority, 44 MOTION for Summary Judgment, 62 Reply to Response to Motion, 113 Jury Verdict, 100 Jury Trial - Held, 117 MOTION for Judgment NOV MOTION for Judgment as a Matter of Law MOTION for New Trial, 131 Order on Motion for Judgment as a Matter of Law, 120 Memorandum in Opposition to Motion, 19 Answer to Complaint, 108 Exhibit List, 53 Memorandum in Opposition to Motion, 47 Memorandum in Support of Motion, 112 Jury Verdict. For docket entries without a hyperlink, contact the court to arrange for the document(s) to be made available to you. (Blue, A.) (Entered: 04/05/2013)

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS	:	CIVIL ACTION NO.
individually and P.P.A as guardian for	:	
K.H., a minor child,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	OCTOBER 28, 2008
Defendants	:	

COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a civil rights action for monetary relief brought pursuant to Title 42 U.S.C. §1983, and the Fourth and Fourteenth Amendments to the United States Constitution, alleging violations of civil rights by two municipal officers of the Hartford Police Department. The plaintiff claims that the officers trespassed onto the plaintiff's fenced yard without a search warrant, where one of the defendants shot and killed the family dog in the presence of the plaintiff's then 12 year old daughter. The plaintiff also invokes supplemental jurisdiction of the court regarding Connecticut state constitutional and tort claims.

II. JURISDICTION

2. This action is brought pursuant to Title 42, United States Code §§ 1983 and 1988, and the Fourth and Fourteenth Amendments to the United States Constitution.

3. Subject matter jurisdiction is founded upon Title 28 U.S.C. §§ 1331 and 1343, and the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

aforementioned constitutional provisions.

4. The plaintiff also seeks to invoke supplemental jurisdiction under Title 28 U.S.C. § 1367.

III. PARTIES

5. The Plaintiff, Glen Harris, (hereinafter "Harris") has been at all times relevant to this complaint, a citizen of the United States and a resident of the Town of Hartford, Connecticut. He is the father and guardian of the minor child, K.H. At all relevant times, he was the owner of a single-family residence located at 297 Enfield Street in the City of Hartford.

6. During all relevant times mentioned in this complaint, the Defendants, Johnmichael O'Hare (hereinafter "O'Hare"), and Anthony Pia (hereinafter "Pia"), were municipal employees of the City of Hartford, Connecticut, employed as patrol officers for the Hartford Police Department. Defendants O'Hare and Pia are sued in their individual capacities.

7. The Defendant, City Of Hartford (hereinafter "City"), is a municipal corporation incorporated pursuant to the laws of the State of Connecticut. At all relevant times herein, it employed the Defendants O'Hare and Pia.

IV. FACTS

8. On or about December 20, 2006, Defendants O'Hare and Pia entered the plaintiff's yard at 297 Enfield Street in Hartford, CT without a warrant, and conducted an illegal search. The defendants had no lawful basis or probable cause to enter the plaintiff's property.

9. The plaintiff's property was clearly designated as private property, and enclosed by a fence along the perimeter of the property. The south side of the property was bordered by an

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

opaque wooden fence. Thus, the plaintiff's rear yard constituted the curtilage of the home, and was clearly demarcated so as to notify all persons that the plaintiff and his daughter possessed a reasonable expectation of privacy in their rear yard..

10. At the aforementioned date and time, attached to the front of the plaintiff's house was a sign that stated: "BEWARE OF THE DOG".

11. At the aforementioned date and time, the plaintiff's minor daughter, K.H., was playing with the family Saint Bernard dog, "Seven," when the Defendants O'Hare and Pia walked uninvited and unannounced into the back yard.

12. As the defendants entered the the rear yard, the Saint Bernard barked and approached them.

13. Defendants O'Hare and Pia suddenly turned and ran toward the front of the plaintiff's home, at which point Defendant O'Hare turned around and shot "Seven" in the chest, wounding the dog and causing it to fall to the ground.

14. Defendant O'Hare stood over the wounded dog, as K.H. approached screaming "don't shoot my dog." At that time, O'Hare aimed his department issued service revolver at "Seven's" right temple and fired at point blank range, thereby killing the dog in the presence of the plaintiff's minor daughter.

V. FIRST CAUSE OF ACTION (42 U.S.C. §1983 Illegal Search And Seizure)

15. The Defendants acted individually, jointly and severally, and in conspiracy with one another, and with other Hartford police officers, to deprive the plaintiff and his minor daughter of their clearly established federal constitutional rights to be free from unreasonable searches and

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

seizures, in violation of Title 42 U.S.C. §1983 and the Fourth Amendment to the U.S.

Constitution. The illegal nature of the defendants' conduct was clearly established at the time of the incident described herein.

16. Defendant O'Hare, while illegally remaining on the plaintiff's property, unlawfully seized the plaintiff's pet dog by shooting it in the chest and head, without probable cause or other lawful justification, in violation of Title 42 U.S.C. §1983 and the Fourth Amendment to the U.S. Constitution.

17. Defendant Pia failed to prevent Defendant O'Hare from unlawfully shooting the plaintiff's dog, although he possessed a sworn duty to uphold state and federal laws.

VI. SECOND CAUSE OF ACTION (Violation Of The Fourteenth Amendment's Due Process Clause By Defendant O'Hare)

18. The allegations contained in paragraphs 1 through 14 are hereby incorporated by reference as if fully set forth herein.

19. After Defendant O'Hare shot and wounded the plaintiff's Saint Bernard, rendering the dog immobile, he approached the helpless animal, deliberately aimed his service revolver at the dog's head, and executed the animal in the presence of the plaintiff's 12 year old daughter.

20. The actions of Defendant O'Hare as aforesaid were so extreme, callous and outrageous that they fell outside the scope of acceptable police behavior and shocks the conscious of civilized society, in violation of the Fourteenth Amendment to the United States Constitution and Title 42, U.S.C. § 1983.

VII. THIRD CAUSE OF ACTION (State Constitutional Violation, Article I, § 7 By Defendants O'Hare and Pia)

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

21. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

22. The Defendants' actions violated Article I, Section 7 of the Connecticut Constitution.

VIII. FOURTH CAUSE OF ACTION (Intentional Infliction of Emotional Distress Defendant O'Hare)

23. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

24. Defendant O'Hare shot the plaintiffs' dog in the head in the presence of K.H., as she pleaded with the defendant not to shoot her dog. Said animal was already incapacitated when Defendant O'Hare fired the shot into "Seven's" temple. O'Hare knew or should have known that his actions would cause severe emotional distress to K.H.

25. By his actions, Defendant O'Hare intentionally or recklessly inflicted emotional distress on the plaintiff's minor daughter.

IX. FIFTH CAUSE OF ACTION (Trespass Claim Against Defendants O'Hare and Pia)

26. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

27. Defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so.

28. The actions of the defendants constituted a trespass under Connecticut law, resulting in damage to the plaintiff.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

X. SIXTH CAUSE OF ACTION (Conversion Claim Against Defendant O'Hare)

29. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

30. Defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog forever deprived the plaintiff of his property, a beloved family pet, resulting in damages.

XI. SEVENTH CAUSE OF ACTION (Negligence claim against Defendants O'Hare, Pia, and the City of Hartford)

31. The allegations contained in paragraphs 5 through 13 are hereby incorporated by reference as if fully set forth herein.

32. Defendants O'Hare and Pia were negligent and/or reckless in entering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

33. The defendants' negligence was a proximate cause of the plaintiffs' injuries.

XII. EIGHTH CAUSE OF ACTION (Indemnification against the City of Hartford)

34. The allegations contained in paragraphs 1 through 33 are hereby incorporated by reference as if fully set forth herein.

35. On or about April 9, 2007, notice pursuant to statute was sent to the Town Clerk of the City of Hartford, alleging injury to the plaintiff as a result of the actions of defendants O'Hare and Pia as described in this complaint.

36. The defendant, City of Hartford, is legally responsible to indemnify and protect defendants O'Hare and Pia from any financial expense, including attorney's fees, incurred by the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

plaintiff for which said defendants O'Hare and Pia are held liable, pursuant to Conn. Gen. Stat §§ 7-101a and 7-465.

XIII. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray that this Court:

1. Assume jurisdiction over this action;
 2. Award compensatory and/or nominal damages to the plaintiff;
 3. Award punitive damages to the plaintiff;
 4. Award costs of this action, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure;
 5. Award attorneys' fees to the plaintiff pursuant to 42 U.S.C. §1988 and Connecticut common law;
 6. Grant such other relief as law and equity may provide.
- A jury trial is hereby demanded.

Dated at Hartford, Connecticut this 28th day of October, 2008.

THE PLAINTIFFS –
GLEN HARRIS, individually and P.P.A., as
guardian and parent of K.H., a minor child.

By: _____
Jon L. Schoenhorn
Fed. Bar No. CT00119
108 Oak Street
Hartford, CT 06106
Tel. No. (860) 278-3500

F:\SHARED\CLIENTS\Ayers-Harris\Ayers complaint.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

.....
GLEN HARRIS, individually and P.P.A : CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child, :
Plaintiffs :
V. :
JOHNMICHAEL O'HARE :
ANTHONY PIA, and :
CITY OF HARTFORD, :
Defendants. :
-----: DECEMBER 23, 2008

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES

The Defendants, City of Hartford, JohnMichael O'Hare and Anthony Pia, hereby respond to the Plaintiff's Complaint dated October 28, 2008, as follows:

1. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 1 and therefore leave Plaintiffs to their proof.
2. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 2 and therefore leave Plaintiffs to their proof.
3. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 3 and therefore leave Plaintiffs to their proof.

4. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 4 and therefore leave Plaintiffs to their proof.
5. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 5 and therefore leave Plaintiffs to their proof.
6. The Defendants admit the allegations insofar as it alleges that Defendants O'Hare and Pia were police officers employed by the City of Hartford, Police Department. As to the remaining allegations contained in paragraph 6, the Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 6 and therefore leave Plaintiffs to their proof.
7. Admitted.
8. Denied.
9. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 9 and therefore leave Plaintiffs to their proof.
10. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 10 and therefore leave Plaintiffs to their proof.

11. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 11 and therefore leave Plaintiffs to their proof.
12. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 12 and therefore leave Plaintiffs to their proof.
13. Denied that the Defendants O'Hare and Pia suddenly turned and ran toward the front of the plaintiff's home. As to the remaining allegations contained in paragraph 13, the Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 13 and therefore leave Plaintiffs to their proof.
14. Denied.
15. Denied.
16. Denied.
17. Denied.
18. The Defendants' responses to Paragraphs 1 through 14 are hereby incorporated by reference as responses to paragraph 18 as if fully set forth herein.
19. Denied.
20. Denied.
21. The Defendants' responses to Paragraph 5 through 14 are hereby incorporated by reference as responses to paragraph 21 as if fully set forth herein.

22. Denied.

23. The Defendants' responses to paragraphs 5 through 14 are hereby incorporated by reference as responses to paragraph 23 as if fully set forth herein.

24. Denied.

25. Denied.

26. The Defendants' responses to paragraphs 5 through 14 are hereby incorporated by reference as responses to paragraph 26 as if fully set forth herein.

27. Denied.

28. Denied.

29. The Defendants' responses to paragraphs 5 through 14 are hereby incorporated by reference as responses to paragraph 29 as if fully set forth herein.

30. Denied.

31. The Defendants' responses to paragraphs 5 through 13 are hereby incorporated by reference as responses to paragraph 31 as if fully set forth herein.

32. Denied.

33. Denied.

34. The Defendants' responses to paragraphs 1 through 33 are hereby incorporated by reference as responses to paragraph 34 as if fully set forth herein.

35. The Defendants have insufficient knowledge and/or information within which to form a belief as to the truth of the allegations contained in paragraph 35 and therefore leave Plaintiffs to their proof.
36. The Defendants do not respond to this paragraph in that the statutory sections speak for themselves.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Plaintiffs' action is barred as it fails to state a claim upon which relief may be granted.

Second Affirmative Defense

The Plaintiffs failed to mitigate their damages.

Third Affirmative Defense

The Plaintiffs' action is barred by the doctrine of qualified immunity.

THE DEFENDANTS
CITY OF HARTFORD, JOHNMICHAL O'HARE
AND ANTHONY PIA

BY: /s/Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
550 Main Street, Suite 303
Hartford, CT 06103
Fed Bar no. ct17217
Telephone: (860) 757-9700
Facsimile: (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION OF SERVICE

This is to certify that on this 23rd day of December, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic system. Parties may access this filing through the Court's system.

/s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

CERTIFICATION

This is to certify that on this 24th day of December, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic system. Parties may access this filing through the Court's system.

____/s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

.....	:	
GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
V.	:	
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	DECEMBER 24, 2008
-----	:	

REPORT OF PARTIES' PLANNING MEETING

Pursuant to Rules 16(b) and 26(f) of the Federal Rule of Civil Procedure and Local Civil Rule 38, a telephone conference was held on December 24, 2008. The participants were:

Jon L. Schoenhorn, for the plaintiffs,
Nathalie Feola-Guerrieri, for the defendants.

I. CERTIFICATION

Undersigned counsel certify that, after consultation with their clients, they have discussed the nature and basis of the parties' claims and defenses and any possibilities for achieving a prompt settlement or other resolution of the case and, in consultation with their clients, have developed the following proposed case management plan. Counsel further certify that they have forwarded a copy of this report to their respective clients.

II. JURISDICTION

A. SUBJECT MATTER JURISDICTION

This action is brought pursuant to Title 42, United States Code §§ 1983 and 1988, and the fourth and fourteenth amendments to the United States Constitution. Jurisdiction is founded upon Title 28, United States Code §§ 1331 and 1342; and the aforementioned statutory and constitutional provisions. Plaintiff also invokes the supplemental jurisdiction of this court to hear and determine claims arising under Connecticut state law and its constitution, pursuant to Title

28, United States Code § 1367.

B. PERSONAL JURISDICTION

Personal jurisdiction is not contested by the parties.

III. BRIEF DESCRIPTION OF CASE

A. CLAIMS OF THE PLAINTIFF:

This is a civil action brought pursuant to the Civil Rights Act of 1866, against two municipal police officers of the City of Hartford, Connecticut. The plaintiff claims the defendants violated his rights under the state and federal constitutions, and pursuant to 42 U.S.C. §§ 1983 and 1988, through illegal search and seizure, due process violations, intentional infliction of emotional distress, trespass, and conversion. The defendant officers trespassed onto the plaintiff's fenced yard without a search warrant, where one of the defendants shot and killed the family dog in the presence of the plaintiff's then 12 year old daughter. The defendant, City of Hartford, is legally responsible to indemnify and protect Defendants O'Hare and Pia from any financial expense, including attorney's fees, incurred by the plaintiff for which Defendants O'Hare and Pia are liable pursuant to Conn. Gen. Stat §§ 7-101a and 7-465.

B. DEFENSES AND CLAIMS:

The Defendants deny the claims of the Plaintiff and that they violated the rights of the Plaintiffs. The Defendants also claim as a defense that the Plaintiffs fail to state a claim upon which relief may be granted and that the officers are immune on the basis of the doctrine of qualified immunity.

IV. STATEMENT OF UNDISPUTED FACTS:

Counsel certify that they have made a good faith attempt to determine whether there are any material facts that are not in dispute. The parties state that the following material facts are undisputed:

During the relevant times in this complaint, the defendants, Johnmichael O'Hare and Anthony Pia, were municipal employees of the City of Hartford, Connecticut, employed as patrol officers for said City.

The defendant, City of Hartford, is a municipal corporation, incorporated under the laws of the State of Connecticut, with powers to employ police officers.

While on the plaintiff's property, Defendant O'Hare shot the plaintiff's dog three times with his department issued service pistol.

V. CASE MANAGEMENT PLAN:

A. PRE-DISCOVERY DISCLOSURES

The Parties will exchange by January 30, 2009, the information required by Fed. R.Civ.P. 26(a)(1).

B. STANDING ORDER ON SCHEDULING IN CIVIL CASES

The parties request a modification of the deadlines in the Standing Order on Scheduling in Civil Cases.

C. SCHEDULING CONFERENCE WITH THE COURT

The parties do not request a pretrial conference with the Court before entry of a scheduling order pursuant to Fed.R.Civ.P. 16(b).

D. EARLY SETTLEMENT CONFERENCE

1. The parties certify that they have considered the desirability of attempting to settle the case before undertaking significant discovery or motion practice. Settlement is unlikely at this time.
2. The Plaintiff would request an early settlement conference.
3. The parties prefer a settlement conference with the judge or with a United States Magistrate Judge.
4. The parties do not request a referral for alternative dispute resolution pursuant to D. Conn. L. Civ. R. 36.

E. JOINDER OF PARTIES AND AMENDMENT OF PLEADINGS

1. Plaintiff does not anticipate joining additional parties and should be allowed until January 31, 2009 to file motions to amend the pleadings.
2. Defendants should be allowed until January 31, 2009, to file motions to join additional parties and until December 31, 2008 to file a response to the complaint.

F. DISCOVERY

1. The parties anticipate that discovery will be necessary on the following subjects: factual circumstances surrounding the tip the police officers received which caused them to enter the plaintiff's property, the factual circumstances surrounding this entry and execution of the plaintiff's dog, and any videos, photographs, or recordings concerning the actions taken against the plaintiff by the defendants.

2. Written discovery may commence by January 2, 2009 and will be completed (not propounded) by May 31, 2009.

3. Discovery will not be conducted in phases.

4. The Plaintiff anticipates that he will require at least 3 depositions of fact witnesses and the defendants will require at least 2 depositions of fact witnesses. The depositions will commence immediately and be completed on or before May 31, 2009.

5. The parties do not anticipate requesting permission to serve more than twenty-five interrogatories on each party.

6. Plaintiff intends to call expert witnesses at trial.

7. Defendants intend to call expert witnesses at trial.

8. A damages analysis, if required, will be provided by the plaintiff on or before March 20, 2009.

9. Undersigned counsel have discussed the disclosure and preservation of electronically stored information, including, but not limited to, the form in which such data shall be produced, search terms to be applied in connection with the retrieval and production of such information, the location and format of electronically stored information, appropriate steps to preserve electronically stored information, and the allocation of costs of assembling and producing such information.

A request for production of "documents" shall encompass, and the response shall include, ESI, as included in Federal Rule of Civil Procedure 34, unless otherwise specified by the requesting party.

At this time, the plaintiff anticipates being able to produce all relevant and non-privileged ESI in hard copy. If the requesting party wishes to have the responsive hard copies produced in a standard CD or DVD format, the requesting party shall bear the burden of such costs.

F. DISPOSITIVE MOTIONS

Dispositive motions will be filed on or before June 30, 2009.

G. JOINT TRIAL MEMORANDUM

The joint trial memorandum required by the Standing Order on Trial Memoranda in Civil Cases will be filed by June 30, 2009 or within 30 days of the Court's decision on any dispositive motions filed.

VI. TRIAL READINESS

The case will be ready for trial within 30 days of the filing of the Joint Trial Memorandum or within 60 days of the Court's decision on any dispositive motions.

As officers of the Court, undersigned counsel agree to cooperate with each other and the Court to promote the just, speedy and inexpensive determination of this action.

PLAINTIFF

DEFENDANT

By: /s/ Jon L. Schoenhorn
JON L. SCHOENHORN, ESQ.

By: /s/ Nathalie Feola-Guerrieri
NATHALIE FEOLA-GUERRIERI,
ESQ.

Fed. Bar #: ct00119

Fed. Bar #: ct17217

Jon L. Schoenhorn & Associates

City of Hartford, Office of
Corporation Counsel

108 Oak Street

550 Main Street, Ste. 303

Hartford, CT 06106

Hartford, CT 06103

Telephone: (860) 278-3500

Telephone: (860) 757-9700

Facsimile: (860) 278-6393

Facsimile: (860) 722-8114

Email: civlrights@aol.com

Email: feoln001@hartford.gov

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CASE NO. 3:08-CV-1644 (RNC)
JOHNMICHAEL O'HARE, ET AL.,	:	
	:	
Defendants.	:	
	:	
	:	
	:	

REFERRAL TO MAGISTRATE JUDGE

This case is hereby referred to Magistrate Judge Donna F. Martinez for the following:

_____	For all pretrial matters excluding trial, unless the parties consent to trial before the magistrate judge;
_____	To confer with the parties and enter the scheduling order required by F.R.Civ.P. 16(b);
_____	To supervise discovery and resolve discovery disputes;
<u> X </u>	To conduct a settlement conference;
_____	To conduct a prefiling conference;
_____	To conduct a status conference;
_____	A hearing on damages and attorney fees;
_____	A ruling on the following pending motions:
	So ordered.

Dated at Hartford, Connecticut this _____ day of December 2008.

/s/ RNC
Robert N. Chatigny, U.S.D.J.

Harris v. O'Hare et al., 3:08cv1644 (RNC)

April 22, 2009. The Clerk will docket this letter and send copies of the letter and this endorsement to counsel of record. Defendants' counsel may file the proposed summary judgment motion on or before June 30, 2009 without a prefiling conference. So ordered.


Robert N. Chatigny, U.S.D.J.

US DISTRICT COURT
HARTFORD CT

2009 APR 22 A 10:39

FILED

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS	:	NO.: 3:08-cv-1644 (RNC)
Individually and PPA as guardian	:	
For K.H., a minor child,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 10, 2009

DEFENDANT CITY OF HARTFORD'S MOTION FOR SUMMARY JUDGMENT

The defendant, City of Hartford, respectfully moves, pursuant to Local Rule 56(a) and Rule 56(b) of the Federal Rules of Civil Procedure, for the entry of summary judgment in its favor on the Seventh and Eighth Causes of Action of the Plaintiff's Complaint dated October 28, 2008, as follows:

1. As set forth in the defendants Johnmichael O'Hare and Anthony Pia's Motion for Summary Judgment and supporting Memorandum, there are no genuine issues of material fact with regard to the plaintiff's claims such that the defendants O'Hare and Pia are entitled to judgment in their favor as a matter of law; and

2. The Seventh and Eighth Causes of Action of the Complaint are asserted against the defendant City of Hartford for indemnification only of the defendants O'Hare's and Pia's actions, pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465; and

3. Should the Court grant summary judgment in favor of the defendants O'Hare and Pia thus determining that said defendants are not liable to the plaintiff for any alleged damages, there can be no damages for which the municipality is obligated

to pay on behalf of O'Hare and Pia pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465, and judgment should accordingly enter in the defendant City's favor.

In support of this Motion, the defendant City of Hartford adopts the defendants O'Hare's and Pia's Statement of Material Facts Not In Dispute and supporting materials, and respectfully submits the attached Local Rule 56(a)(1) Statement, to which there is no genuine issue, and the following exhibit:

A. Plaintiff's October 28, 2008 Complaint

WHEREFORE, for all of the foregoing reasons as are more particularly set forth in the accompanying memorandum of law and supporting documents, the defendant City of Hartford respectfully moves that this Court enter summary judgment in its favor on the Seventh and Eighth Causes of Action of the plaintiff's Complaint dated October 28, 2008.

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
It's Attorney
550 Main Street
Hartford, CT 06103
Federal Bar No. ct17217
Telephone (860) 757-9700
Facsimile (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION

This is to certify that on August 10, 2009, a copy of the foregoing Motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Thomas Gerarde, Esq.
Alan R. Dembiczak, Esq.
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. :	NO.: 3:08CV01644(RNC)
as Guardian for K.H., a minor child :	
:	
v. :	
:	
JOHNMICHAEL O'HARE, :	
ANTHONY PIA, and :	
CITY OF HARTFORD :	AUGUST 10, 2009

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CITY OF HARTFORD'S
MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND BACKGROUND

The instant action filed by the plaintiff, Glen Harris, individually and P.P.A. as guardian for K.H., a minor child, against the defendants, City of Hartford and Hartford Police Officers Johnmichael O'Hare and Anthony Pia, was filed with this court on or about October 28, 2008.

The complaint consists of six counts. The First, Second, Third, Fourth, Fifth and Sixth Causes of Action are asserted solely against the defendants O'Hare and Pia, in their individual capacities for trespass, intentional infliction of emotional distress, conversion, negligence, violation of the Civil Rights Act, the Fourteenth Amendment of the United States Constitution and violation of the Connecticut Constitution. These counts also contain allegations that do not amount to actual viable claims and/or causes of action. The only claims asserted against the defendant City of Hartford, in the Seventh and Eighth Causes of Action, are for indemnification of the defendant officers' actions pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465. (See Complaint Attached as Exhibit A to Rule 56(a)(1) Statement).

The defendants O'Hare and Pia filed a motion for summary judgment which is currently pending with a deadline of July 8, 2009 within which the plaintiff is to file his opposition.

Without restating the arguments made by the defendants O'Hare and Pia, the undersigned, on behalf of the defendant City of Hartford, adopts and incorporates by reference herein the facts, case law and supporting documents set forth and attached to the defendants O'Hare's and Pia's Motion for Summary Judgment, and asserts that the defendants O'Hare and Pia are entitled to summary judgment in their favor for all the reasons set forth in their Motion and Memorandum of Law. Should the court grant summary judgment in favor of the defendants O'Hare and Pia, the defendant City of Hartford is also entitled to summary judgment, as set forth herein, and as supported by the defendant City of Hartford's Rule 56(a)(1) Statement and attached documents. Specifically, since there are no genuine issues of material fact with regard to the plaintiff's claims such that the defendants O'Hare and Pia are entitled to judgment in their favor as a matter of law and are not liable to the plaintiff for any damages, there are no damages for which the municipality is obligated to pay on their behalf pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465, indemnification statutes.

II. LAW AND ARGUMENT

A. Standard on Motion for Summary Judgment

Summary judgment is appropriate only when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The substantive law governing the case will identify those facts that

are material, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”

Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 59 (2d Cir. 2006) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

The moving party bears the burden of showing that no genuine issues exist as to any material facts. See, Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). If the moving party meets its burden, “an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e). “If the party moving for summary judgment demonstrates the absence of any genuine issue as to all material facts, the nonmoving party must, to defeat summary judgment, come forward with evidence that would be sufficient to support a jury verdict in its favor.” Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 302 F.3d 83, 91 (2d Cir. 2002).

“The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture.” Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990) (internal quotations and citations omitted). A party also may not rely on conclusory statements and unsupported allegations that the evidence in support of the motion for summary judgment is not credible. Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993).

B. Connecticut General Statutes Sections 7-101a and 7-465

General Statutes § 7-101a requires that “municipalities indemnify municipal employees for negligent actions occurring in the scope of employment.” (Emphasis added.) St. George v. Gordon, 264 Conn. 538, 559, 825 A.2d 90 (2003). This statute does not provide a right of action by a plaintiff against the municipality itself. See General Statutes § 7-101a. Accordingly, summary judgment is appropriate on the Eighth Cause of Action with regard to plaintiffs’ claims for indemnification pursuant to § 7-101a.

Under Connecticut law, Conn. Gen. Stat. § 7-465 is an indemnity statute. Atwood v. Town of Ellington, 427 F.Supp.2d 136, 143 (2006). The statute reads:

[a]ny town, city, or borough...shall pay on behalf of any employee of such municipality...all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person’s civil rights or for physical damages to person or property...if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any willful or wanton act of such employee in the discharge of such duty Governmental immunity shall not be a defense in any action brought under this section.
Conn. Gen. Stat. Sec. 7-465.

“Section 7-465 is an indemnity statute; it does not create liability. Under Section 7-465, the municipality’s duty to indemnify attaches only when the employee is found to be liable and the employee’s actions do not fall within the exception for willful and wanton acts.” Myers v. City of Hartford, 84 Conn. App. 395, 399, 400, 853 A.2d 621 (2004). See also Holeman v. City of New London, 330 F.Supp.2d 99 (D.Conn. 2004), rev’d in part and dismissed in part on other grounds, 425 F.3d 184 (2d Cir. 2005). Section 7-465 imposes no liability upon a municipality for breach of any statutory duty of

its own. Ahern v. New Haven, 190 Conn. 77, 82 (1983). The obligation imposed is indemnification for the legal liability arising out of certain tortious conduct of the municipal employee, and the municipality's liability is derivative. Ahern, Id. A plaintiff bringing suit under Section 7-465 first must allege in a separate count and prove the employee's duty to the individual injured and the breach thereof. Only then may the plaintiff go on to allege and prove the municipality's liability by indemnification.

As set forth in the defendants O'Hare and Pia's motion for summary judgment, there are no genuine issues of material fact with regard to the plaintiffs claims such that they are entitled to judgment as a matter of law and are not liable to the plaintiffs for any damages. Since the defendant City's liability is derivative only, there are no damages for which the municipality is obligated to pay pursuant to Conn. Gen. Stat. Section 7-465 and judgment must accordingly enter in the defendant City of Hartford's favor on the Seventh and Eighth Causes of Action.

III. CONCLUSION

For all the foregoing reasons, the defendant, City of Hartford respectfully moves for the entry of summary judgment in its favor on the Seventh and Eighth Causes of Action of the plaintiff's Complaint.

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
It's Attorney
550 Main Street
Hartford, CT 06103
Federal Bar No. ct17217
Telephone (860) 757-9700
Facsimile (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION

This is to certify that on August 10, 2009, a copy of the foregoing Memorandum of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Thomas R. Gerarde
Alan R. Dembiczak
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. :	NO.: 3:08CV01644(RNC)
as Guardian for K.H., a minor child :	
:	
v. :	
:	
JOHNMICHAEL O'HARE, :	
ANTHONY PIA, and :	
CITY OF HARTFORD :	AUGUST 10, 2009

DEFENDANT CITY OF HARTFORD'S LOCAL RULE 56(a)1 STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 56(a)(1), the defendant City of Hartford respectfully adopts the defendants Officer O'Hare's and Officer Pia's Statement of Material Facts Not In Dispute and supporting materials, and respectfully submits its Local Rule 56(a)(1) Statement, to which there is no genuine issue, as follows:

1. The plaintiff has brought the present action against the defendants Johnmichael O'Hare, Anthony Pia and the City of Hartford. See Complaint, attached hereto as Exhibit A.
2. The Complaint consists of eight causes of action (counts).
3. The First, Second, Third, Fourth, Fifth and Sixth Causes of Action are asserted solely against the defendants Johnmichael O'Hare and Anthony Pia, in their individual capacities, for trespass, intentional infliction of emotional distress, negligence, violation of the Civil Rights Act, violation of the Fourteenth Amendment of the U.S. Constitution and violation of the Connecticut Constitution. These counts also contain allegations that do not amount to actual viable claims and/or causes of action. See Exhibit A.

4. In the Seventh and Eighth Causes of Action, the plaintiff asserts claims against the City of Hartford for indemnification only of the defendants O'Hare's and Pia's actions pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465. See Exhibit A.

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
It's Attorney
550 Main Street
Hartford, CT 06103
Federal Bar No. ct17217
Telephone (860) 757-9700
Facsimile (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION

This is to certify that on August 10, 2009, a copy of the foregoing Local Rule 56(a)(1) Statement of Material Facts was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates
108 Oak Street
Hartford, CT 06106-1514

Thomas R. Gerarde
Alan R. Dembiczak
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS	:	CIVIL ACTION NO.
individually and P.P.A as guardian for	:	
K.H., a minor child,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	OCTOBER 28, 2008
Defendants	:	

COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a civil rights action for monetary relief brought pursuant to Title 42 U.S.C. §1983, and the Fourth and Fourteenth Amendments to the United States Constitution, alleging violations of civil rights by two municipal officers of the Hartford Police Department. The plaintiff claims that the officers trespassed onto the plaintiff's fenced yard without a search warrant, where one of the defendants shot and killed the family dog in the presence of the plaintiff's then 12 year old daughter. The plaintiff also invokes supplemental jurisdiction of the court regarding Connecticut state constitutional and tort claims.

II. JURISDICTION

2. This action is brought pursuant to Title 42, United States Code §§ 1983 and 1988, and the Fourth and Fourteenth Amendments to the United States Constitution.

3. Subject matter jurisdiction is founded upon Title 28 U.S.C. §§ 1331 and 1343, and the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

aforementioned constitutional provisions.

4. The plaintiff also seeks to invoke supplemental jurisdiction under Title 28 U.S.C. § 1367.

III. PARTIES

5. The Plaintiff, Glen Harris, (hereinafter "Harris") has been at all times relevant to this complaint, a citizen of the United States and a resident of the Town of Hartford, Connecticut. He is the father and guardian of the minor child, K.H. At all relevant times, he was the owner of a single-family residence located at 297 Enfield Street in the City of Hartford.

6. During all relevant times mentioned in this complaint, the Defendants, Johnmichael O'Hare (hereinafter "O'Hare"), and Anthony Pia (hereinafter "Pia"), were municipal employees of the City of Hartford, Connecticut, employed as patrol officers for the Hartford Police Department. Defendants O'Hare and Pia are sued in their individual capacities.

7. The Defendant, City Of Hartford (hereinafter "City"), is a municipal corporation incorporated pursuant to the laws of the State of Connecticut. At all relevant times herein, it employed the Defendants O'Hare and Pia.

IV. FACTS

8. On or about December 20, 2006, Defendants O'Hare and Pia entered the plaintiff's yard at 297 Enfield Street in Hartford, CT without a warrant, and conducted an illegal search. The defendants had no lawful basis or probable cause to enter the plaintiff's property.

9. The plaintiff's property was clearly designated as private property, and enclosed by a fence along the perimeter of the property. The south side of the property was bordered by an

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

opaque wooden fence. Thus, the plaintiff's rear yard constituted the curtilage of the home, and was clearly demarcated so as to notify all persons that the plaintiff and his daughter possessed a reasonable expectation of privacy in their rear yard..

10. At the aforementioned date and time, attached to the front of the plaintiff's house was a sign that stated: "BEWARE OF THE DOG".

11. At the aforementioned date and time, the plaintiff's minor daughter, K.H., was playing with the family Saint Bernard dog, "Seven," when the Defendants O'Hare and Pia walked uninvited and unannounced into the back yard.

12. As the defendants entered the the rear yard, the Saint Bernard barked and approached them.

13. Defendants O'Hare and Pia suddenly turned and ran toward the front of the plaintiff's home, at which point Defendant O'Hare turned around and shot "Seven" in the chest, wounding the dog and causing it to fall to the ground.

14. Defendant O'Hare stood over the wounded dog, as K.H. approached screaming "don't shoot my dog." At that time, O'Hare aimed his department issued service revolver at "Seven's" right temple and fired at point blank range, thereby killing the dog in the presence of the plaintiff's minor daughter.

V. FIRST CAUSE OF ACTION (42 U.S.C. §1983 Illegal Search And Seizure)

15. The Defendants acted individually, jointly and severally, and in conspiracy with one another, and with other Hartford police officers, to deprive the plaintiff and his minor daughter of their clearly established federal constitutional rights to be free from unreasonable searches and

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

seizures, in violation of Title 42 U.S.C. §1983 and the Fourth Amendment to the U.S.

Constitution. The illegal nature of the defendants' conduct was clearly established at the time of the incident described herein.

16. Defendant O'Hare, while illegally remaining on the plaintiff's property, unlawfully seized the plaintiff's pet dog by shooting it in the chest and head, without probable cause or other lawful justification, in violation of Title 42 U.S.C. §1983 and the Fourth Amendment to the U.S. Constitution.

17. Defendant Pia failed to prevent Defendant O'Hare from unlawfully shooting the plaintiff's dog, although he possessed a sworn duty to uphold state and federal laws.

VI. SECOND CAUSE OF ACTION (Violation Of The Fourteenth Amendment's Due Process Clause By Defendant O'Hare)

18. The allegations contained in paragraphs 1 through 14 are hereby incorporated by reference as if fully set forth herein.

19. After Defendant O'Hare shot and wounded the plaintiff's Saint Bernard, rendering the dog immobile, he approached the helpless animal, deliberately aimed his service revolver at the dog's head, and executed the animal in the presence of the plaintiff's 12 year old daughter.

20. The actions of Defendant O'Hare as aforesaid were so extreme, callous and outrageous that they fell outside the scope of acceptable police behavior and shocks the conscious of civilized society, in violation of the Fourteenth Amendment to the United States Constitution and Title 42, U.S.C. § 1983.

VII. THIRD CAUSE OF ACTION (State Constitutional Violation, Article I, § 7 By Defendants O'Hare and Pia)

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

21. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

22. The Defendants' actions violated Article I, Section 7 of the Connecticut Constitution.

VIII. FOURTH CAUSE OF ACTION (Intentional Infliction of Emotional Distress Defendant O'Hare)

23. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

24. Defendant O'Hare shot the plaintiffs' dog in the head in the presence of K.H., as she pleaded with the defendant not to shoot her dog. Said animal was already incapacitated when Defendant O'Hare fired the shot into "Seven's" temple. O'Hare knew or should have known that his actions would cause severe emotional distress to K.H.

25. By his actions, Defendant O'Hare intentionally or recklessly inflicted emotional distress on the plaintiff's minor daughter.

IX. FIFTH CAUSE OF ACTION (Trespass Claim Against Defendants O'Hare and Pia)

26. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

27. Defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so.

28. The actions of the defendants constituted a trespass under Connecticut law, resulting in damage to the plaintiff.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

X. SIXTH CAUSE OF ACTION (Conversion Claim Against Defendant O'Hare)

29. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

30. Defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog forever deprived the plaintiff of his property, a beloved family pet, resulting in damages.

XI. SEVENTH CAUSE OF ACTION (Negligence claim against Defendants O'Hare, Pia, and the City of Hartford)

31. The allegations contained in paragraphs 5 through 13 are hereby incorporated by reference as if fully set forth herein.

32. Defendants O'Hare and Pia were negligent and/or reckless in entering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

33. The defendants' negligence was a proximate cause of the plaintiffs' injuries.

XII. EIGHTH CAUSE OF ACTION (Indemnification against the City of Hartford)

34. The allegations contained in paragraphs 1 through 33 are hereby incorporated by reference as if fully set forth herein.

35. On or about April 9, 2007, notice pursuant to statute was sent to the Town Clerk of the City of Hartford, alleging injury to the plaintiff as a result of the actions of defendants O'Hare and Pia as described in this complaint.

36. The defendant, City of Hartford, is legally responsible to indemnify and protect defendants O'Hare and Pia from any financial expense, including attorney's fees, incurred by the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

plaintiff for which said defendants O'Hare and Pia are held liable, pursuant to Conn. Gen. Stat §§ 7-101a and 7-465.

XIII. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray that this Court:

1. Assume jurisdiction over this action;
 2. Award compensatory and/or nominal damages to the plaintiff;
 3. Award punitive damages to the plaintiff;
 4. Award costs of this action, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure;
 5. Award attorneys' fees to the plaintiff pursuant to 42 U.S.C. §1988 and Connecticut common law;
 6. Grant such other relief as law and equity may provide.
- A jury trial is hereby demanded.

Dated at Hartford, Connecticut this 28th day of October, 2008.

THE PLAINTIFFS –
GLEN HARRIS, individually and P.P.A., as
guardian and parent of K.H., a minor child.

By: _____
Jon L. Schoenhorn
Fed. Bar No. CT00119
108 Oak Street
Hartford, CT 06106
Tel. No. (860) 278-3500

F:\SHARED\CLIENTS\Ayers-Harris\Ayers complaint.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	
	:	
JOHNMICHAEL O'HARE, ANTHONY	:	
PIA, and CITY OF HARTFORD,	:	
Defendants.	:	AUGUST 10, 2009

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and District of Connecticut Local Rule 56, the plaintiffs, Glen Harris, individually and on behalf of K.H., a minor child, hereby move for partial summary judgment against defendants Johnmichael O'Hare, Anthony Pia, and the City of Hartford. The plaintiffs contend that no genuine issue of material fact exists between the parties with respect to violations of the plaintiffs' rights under the fourth amendment to the United States Constitution (First Cause of Action), and Article I, Sections 7 of the Connecticut Constitution (Third Cause of Action), of the plaintiffs' complaint, specifically regarding the defendants' illegal entry into the plaintiffs' home and seizure of their pet dog. The plaintiffs also move for summary judgment with respect to their claims of trespass (Fifth Cause of Action) and conversion (Sixth Cause of Action) under Connecticut common law. Finally, the plaintiffs move for summary judgment on their indemnification claim against the City of Hartford. (Eighth Cause of Action).

In support hereof, the plaintiffs submit a Local Rule 56(a)1 Statement of Facts, an Exhibit List and 17 exhibits, and a memorandum of law.

Oral argument hereupon is requested.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

WHEREFORE, for the reasons set forth in the accompanying memorandum of law and attachments, the plaintiffs request that the Court grant their motion.

THE PLAINTIFFS–
GLENN HARRIS, INDIVIDUALLY AND PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
Fed Bar #ct00119
(860) 278-3500
Fax: (860) 278-6393
Email: Civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
V.	:	
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	AUGUST 10, 2009

**PLAINTIFFS' LOCAL RULE 56(a)1 STATEMENT
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Pursuant to rule 56(a)(1) of the Local Rules of Civil Procedure, the plaintiff, Glen Harris, submits the following statement of undisputed material facts in support of his motion for summary judgment.

1. At all times relevant to the complaint, Glen Harris owned and resided at 297 Enfield Street, in Hartford, Connecticut with his daughter K. H., then 12 years old, and his girlfriend Tashonna Ayers. No other person resided at 297 Enfield Street in 2006. Glen Harris Dep., Ex. SJ-1, at 11-12, 124.

2. At all times relevant to the complaint, Officers O'Hare, Pia, and Laureano were all employees of the Hartford Police Department and the City of Hartford. O'Hare Dep., Ex. SJ-2 at 10; Pia Dep., Ex. SJ-3, at 6; Laureano Dep., Ex. SJ-4, at 9.

3. In 2003, Glen Harris purchased two purebred St. Bernard dogs, named Seven and Deuce, which lived with the family at 297 Enfield Street. Ex. SJ-1, at 13-14.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

4. Prior to December 2006, Glen Harris posted “Beware of Dog” signs on three sides of the house at 297 Enfield Street, so the general public would be aware that dogs lived there. Ex. SJ-1, at 46-47; Ex. SJ-2 at 69-70; Picture of Front Yard, Ex. SJ-5.

5. Glen Harris’s back yard at 297 Enfield Street was completely fenced in, so that his dogs would not be able to escape into neighboring yards. Ex. SJ-1, at 24-25, 131-132.

6. In December, 2006, the property at 297 Enfield Street was enclosed by fences on all four sides of the property. Ex. SJ-1, at 24-25, 28-29, 33-34, 43, 131-132; Ex. SJ-2, at 60, 66-67, 82; Picture of Rear Yard, Ex. SJ-6; Satellite Picture, Ex. SJ-7; Picture of Front Yard, Ex. SJ-8.

7. Along one side of the house, on the northeast border of the property, there was a chainlink fence. Ex. SJ-1, at 24; Ex. SJ-7; Ex. SJ-8.

8. A garage and a wooden fence formed a continuous barrier along the northwest border in the rear of the property. Ex. SJ-1, at 24; Ex. SJ-6.

9. There was a wooden fence along the southwest border, which is the left side of the property if one is facing the front of the house. Ex. SJ-1, at 131-132; Picture of Rear Yard, Ex. SJ-6; Ex. SJ-2, at 60, 82.

10. There was a chainlink fence immediately behind the wooden fence along the southwest border of the property, forming a continuous barrier along that border even though portions of the wooden fence were knocked down after a tree fell on the fence during a storm. Ex. SJ-1 at 28-29, 33-34, 43; Picture of Rear Yard, Ex. SJ-6.

11. There was a chainlink fence which ran along the front of the property. This fence had only two openings. One opening was for a gate leading to the front walkway, and the other was an opening across the driveway so that automobiles may enter onto the property. Ex. SJ-1, at 25; Picture of Front Yard, Ex. SJ-8.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

12. The plaintiffs used the fenced in back yard to play with their dogs, maintain their automobiles, cook, eat, and entertain their friends and family. Glen Harris Aff. Ex. SJ-9.

13. On December 20, 2006 Officer Laureano noticed Mr. Hemingway loitering in front of 717 Garden Street while operating fully marked police vehicle number 231 with Defendant O'Hare. Ex. SJ-4, at 26-27; Ex. SJ-2, at 20-21.

14. Mr. Hemingway began to walk away from 717 Garden Street. As he walked away Officer Laureano noticed him drop several plastic bags. Upon investigation O'Hare found the bags to contain heroin. Ex. SJ-4, at 24; Ex. SJ-3, at 24.

15. Defendant O'Hare and Officer Laureano ordered Mr. Hemingway to stop walking away, and he complied. Ex. SJ-2, at 25.

16. Sometime after that, Officer Laureano questioned Mr. Hemingway alone and received information from Mr. Hemingway to the effect that there were two guns located in an abandoned Nissan Maxima in the back yard of 297 Enfield Street. Ex. SJ-4, at 35-36; Arrest Warrant Affidavit, Ex SJ-10.

17. Mr. Hemingway would not tell Laureano how he knew about the firearms. Ex. SJ-4, at 35-36; Ex SJ-10.

18. Neither O'Hare nor Pia considered Mr. Hemingway to be a reliable informant, and both officers knew that Mr. Hemingway was a convicted felon. Ex. SJ-2, at 22-23; Ex. SJ-3, at 25-26.

19. Neither O' Hare nor Pia heard the conversation between Officer Laureano and Mr. Hemingway. Ex. SJ-2, at 27; Ex. SJ-4, at 35.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

20. Officer Laureano told O'Hare and Pia that Mr. Hemingway indicated that there were two guns in an abandoned vehicle in the rear yard of 297 Enfield Street. Ex. SJ-2, at 39-40; Ex. SJ-3, at 30, 32; Ex. SJ-4, at 62, 66; O'Hare's Incident Supplement for Case 06-54779, Ex. SJ-11; Pia's Incident Supplement for Case 06-54779. Ex. SJ-12; Laureano's Incident Supplement for Case 06-54779, Ex SJ-16.

21. O'Hare and Pia drove to 297 Enfield Street. Ex. SJ-2, at 47-48; Ex. SJ-3, at 39; Ex. SJ-11; Ex. SJ-12.

22. O'Hare was unable to see the back yard from street. He did not see any abandoned car. Ex. SJ-2, at 51-52.

23. O'Hare and Pia entered the property and moved across the front yard, then continued along the northeast side of the property, between the house and the fence. Ex. SJ-2, at 48-49, 54; Ex. SJ-3, at 42, 44; Diagram of Officer's Path on the Property, Ex. SJ-13.

24. O'Hare and Pia possessed no warrant to go onto the property of 297 Enfield Street, nor did they get permission from anyone who lived there. Ex. SJ-2, at 50-51; Ex. SJ-3, at 33-34.

25. O'Hare and Pia did not make communication to any other officer about leaving their patrol vehicle and coming onto the property. Ex. SJ-3, at 40.

26. O'Hare and Pia both had their firearms drawn as they approached the rear yard of the plaintiff's house. Ex SJ-3, at 58.

27. K. H. returned home from school on December 20, 2006 and let Seven and Deuce out to the back yard one at a time. When the defendants entered the yard at about 3:22 pm, she was standing outside with Seven. Ex. SJ-1, 59-60; K. H. Dep., Ex. SJ-14, at 15.

28. As Pia rounded the corner of the house, he observed a Saint Bernard in the southwest corner of the rear yard. Ex. SJ-3 at 52.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

29. Pia recognized that the dog was not a Pit Bull. Ex. SJ-3, at 52-53.

30. As O'Hare rounded the corner of the house, he observed a large brown and white dog coming out from under the displaced boards of the wooden fence on the southwest border of the property. Ex. SJ-2, at 55.

31. After spotting the dog in backyard, Defendants O'Hare and Pia turned and ran back along the northeast side of the house and across the front lawn. The dog followed the defendants onto the front yard. O'Hare Dep., Ex. SJ-2, at 63-66; Pia Dep., Ex. SJ-3 at 56-57, 59.

32. Defendant Pia kept running across driveway and onto the sidewalk. When he looked back, he saw Defendant O'Hare in the middle of the front yard with his firearm drawn, telling the dog to stop. Ex. SJ-2, at 63-64; Ex. SJ-3 at 56-57, 59.

33. The dog hesitated momentarily, then continued to move toward O'Hare. Ex. SJ-2, at 64-65.

34. O'Hare fired three shots into the dog and the dog dropped to the ground instantly. Ex. SJ-2, at 69; Ex. SJ-3 at 59.

35. When he shot Seven, O'Hare was standing inside the fence in front yard near the driveway, and Seven was near the front walk way. Police Photograph, Ex. SJ-15; Ex. SJ-14, at 32, 38; Ex. SJ-2, at 66.

36. After O'Hare shot the dog, K.H. ran to the body, crying. Ex. SJ-2, at 90-91; Ex. SJ-3, at 64-65; Ex. SJ-14 at 29-30, 35.

37. Seven died that afternoon of the gunshot wounds inflicted by O'Hare. Ex. SJ-1, at 66.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

38. The plaintiff mailed a Notice of Intent to Sue to the Town Clerk of the City of Hartford on or about April 9, 2007, and the Town Clerk received the Notice of Intent to Sue on or about April 10, 2007. Notice of Intent to Sue, Ex. SJ-17.

THE PLAINTIFF,
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
JON L. SCHOENHORN
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
Fed Bar #ct00119
(860) 278-3500
Fax: (860) 278-6393
Email: Civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Summary Judgment\56a1.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
V.	:	
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	AUGUST 10, 2009

EXHIBIT LIST

SJ-1	Glen Harris Dep.
SJ-2	O'Hare Dep.
SJ-3	Pia Dep.
SJ-4	Laureano Dep.
SJ-5	Picture of Front Yard at 297 Enfield Street
SJ-6	Picture of Rear Yard at 297 Enfield Street
SJ-7	Satellite Picture of 297 Enfield Street
SJ-8	Picture of Front Yard at 297 Enfield Street
SJ-9	Glen Harris Aff.
SJ-10	Arrest Warrant Affidavit
SJ-11	O'Hare's Police Report
SJ-12	Pia's Police Report
SJ-13	Diagram of Officer's Path
SJ-14	K.H. Dep.
SJ-15	Police Photograph
SJ-16	Laureano's Police Report
SJ-17	Intent to Sue

EXHIBIT SJ-1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and PPA as	:	
Guardian for K.H., a minor child,	:	
Plaintiffs,	:	Civil Action No.
	:	
vs.	:	3:08CV01644-RNC
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA,:	:	
AND CITY OF HARTFORD,	:	MAY 6, 2009
Defendants.	:	
	:	

DEPOSITION OF GLEN HARRIS

APPEARANCES:

JON L. SCHOENHORN & ASSOCIATES, LLC

Attorneys for the Plaintiffs

108 Oak Street

Hartford, Connecticut 06106-1514

(860) 278-3500

BY: JON L. SCHOENHORN, ESQUIRE

SARA PACKMAN, ESQUIRE

HOWD & LUDORF, LLC

Attorneys for the Defendants

65 Wethersfield Avenue

Hartford, Connecticut 06114-1190

(860) 249-1361

BY: THOMAS R. GERARDE, ESQUIRE

OFFICE OF THE CORPORATION COUNSEL

Attorneys for the City of Hartford

550 Main Street

Hartford, Connecticut 06103

(860) 757-9700

BY: NATHALIE FEOLA-GUERRIERI, ESQUIRE

Assistant Corporation Counsel

ALSO PRESENT: K.H., Plaintiff

NICOLE M. GOSSELIN, R.P.R.

G L E N H A R R I S ,

of 213 Barbour Street, Hartford, Connecticut,
being first duly sworn by Nicole M. Gosselin, R.P.R.,
a Notary Public within and for the state of
Connecticut, was examined, and testified on his
oath as follows:

11

A Yes.

Q Jenkins?

A Yes.

Q J-e-n-k-i-n-s?

A Yes.

Q And where does she live?

A In Meriden, Connecticut.

Q Do you know the address?

A No, I don't.

Q Were you ever married to Marquette Jenkins?

A No.

Q Is there a custody arrangement regarding K?

A Yes.

Q What is that?

A I have custody.

Q Do you have sole custody?

A Yes.

Q Does Marquette Jenkins have visitation rights?

A This is agreed on between us. It's not a court order.

Q Okay. So K lives with you full time?

A Yes.

Q And what was the arrangement -- excuse me for a minute -- as of December 2006?

A She lived with me full time.

12

Q Full time?

A Yes.

Q As of December 2006, where were you living?

A Two ninety-seven Enfield Street in Hartford.

Q Did you own that?

A Yes.

Q Do you own that home?

A Yes.

Q And who else lived at 297 Enfield Street as of
December 2006?

A K, me and Tashonna.

Q You, K and Tashonna?

A Yes.

Q Tashonna Ayers?

A Yes.

Q When did you first purchase 297 Enfield Street?

A That was, I believe, in fall of 2003.

Q And did you live at 297 Enfield Street up until
March of 2008 when you moved over to Barbour Street?

A Yes.

Q What is K's date of birth, please?

A September 1st, 1994.

Q During the period of time you lived at 297
Enfield Street, which is fall 2003 to March 2008, did K
live with you?

13

A Yes.

Q Full time?

A Yes.

Q Now, I understand that as of December 20, 2006, prior to police arrival at your home, there were two dogs living in that home?

A Yes.

Q One dog was named Seven?

A Yes.

Q And the other was named Deuce?

A Yes.

Q What breed is Deuce?

A Saint Bernard.

Q Both Saint Bernards?

A Yes.

Q Tell me about your history of having dogs living at the home at 297 Enfield Street?

MR. SCHOENHORN: Objection to the form.

BY MR. GERARDE:

Q Well, I'm just wondering have you always had a dog of one kind or another, and take me through that, while you were owning the Enfield Street home?

A Those were the only two dogs I owned on Enfield Street.

Q And do you remember when it was that you got

14

Seven; in other words, when was Seven brought to the home first?

A Deuce and Seven were purchased at the same time.

They were brothers from the same litter.

Q Do you remember when that was?

A That was fall of 2003.

Q So Deuce and Seven are both male?

A Yes.

Q And they were from the same litter purchased?

A Yes.

Q I see that you have papers that -- Are they both AKC-registered Saint Bernards?

A I never proceeded to register them. But they are both AKC.

Q They are purebred?

A Yes.

Q Tell me about your education, Mr. Harris, did you go to high school somewhere?

A Weaver High.

Q Graduated what year?

A Class of '89.

Q Did you go to college at all?

A I went to New England Technical Institute.

Q And what was your trade?

A Electronics technology.

24

BY MR. GERARDE:

Q Well, if you -- Do you understand what I'm getting at?

A When the dogs were in the yard, the backyard is completely fenced in. They were only in the backyard.

Q Okay. So what, you would only let the dogs out off leash when they were in a fenced area so that they couldn't, for instance, run into the neighbor's yard?

MR. SCHOENHORN: Objection to form.

Q Is that correct?

A The only way they can go into the neighbor's yard is if they jump the fence.

BY MR. GERARDE:

Q Okay. And let me ask you about the fence, can you describe how the backyard is fenced in so that when your dogs are let out off leash, they can't get into the neighbor's yard unless they jump the fence?

A There is a wooden fence next to a garage. And there is a wooden fence coming down this side of the yard. The only yard they can get into if they jump the fence would be the yard to the right of the backyard.

Q Now, what about getting around to the front of your yard, could the dogs do that when they are off leash?

A Yes, they can go to the front of the yard.

Q How would they do that?

25

A If they went to the front of the yard, they would go down the side of the house opposite to the driveway.

Q What about getting onto the driveway, could the dogs get onto the driveway, if they were not on the leash?

A Yes, they could.

Q How would they do that?

A Just walk through the driveway.

Q So that the driveway connects to the rear of your yard?

A Yes.

Q And there is no fence between the grass part of the rear of your yard and your driveway?

A No.

Q I'm right about that?

A Yes.

Q So the dogs could actually get out into the street if they were out in the backyard?

A If they wanted to, yeah.

Q And the way they would do that would be they walk from the backyard over to the driveway and then out into the road; is that correct?

A Yes.

Q Now, was there any rule that you had as the leader of the home and the owner of the dogs that limited

28

person, whether it's the mailman or some solicitor coming to your front step, or anything like that?

A There was a time when I walked the neighborhood, they were barking at somebody.

Q Just so I have an idea, tell me what that was about?

A I'm walking the dogs on Weston Street in Hartford, I had a negative image of someone that I saw on the street, and I think they responded to how I was feeling. And they barked.

Q And but you had the dogs on a leash --

A Yes.

Q -- so you held them back?

A Yes.

Q When was that; do you remember what year it was?

A That was probably 2005.

Q Now, you say that the only way the dogs could get into the neighbor's yard would be to jump the fence that was on the border between your yard and the neighbor's yard?

A Yes.

Q Were there any holes in that fence?

A No.

Q Are you sure there were no holes in the fence as of December of 2006?

29

A Positive.

Q What about if it's not a hole in the fence, sometimes an area where it can be breached maybe where two joints in the fence exist, or sometimes the ground is a little bit lower than the fence?

A No.

Q So there's no way?

A No.

Q So I guess I just want to be clear, the mailman is always the person who interacts and knows where the dogs are in the family's home. If your dog saw the mailman walk onto the property, they wouldn't bark?

A I didn't receive any mail at that address.

Q What, did you have a P.O. box?

A No, I have a mailing address that I use for my mail.

Q What is that?

A Eleven High Street in Hartford.

Q Is that another property you own?

A That's my mother's house.

Q So I'll get away from the mailman since that obviously is a poor analogy, but do you have any memory of either of your dogs barking at another human being who had walked onto your property for whatever reason to ring your front doorbell to whatever?

33

depict?

A The top photograph is the driveway of the home from the street.

Q So the home at 297 Enfield Street is the white house you see on the right side of the photograph?

A Yes.

Q Is that your vehicle in the driveway?

A Yes.

Q And on the left side of photograph C is a wood fence. Do you see that?

A Yes.

Q And that's one of the wood fences that separates your property from your neighbor's property?

A Yes.

Q Are you saying that there is no place where one of your Saint Bernards could go through or past this fence?

A You see right here?

Q Yes.

A Okay, this is where the wooden fence is broken, but there is a chain link fence behind that. There is no way they can go in another yard.

Q Okay. So I want to describe for the record what you told me. If you follow the wood fence all the way to the driveway --

A Yes.

34

Q -- you can see there is an area where it appears that the wood fence stops and there may be a break in it; is that right?

A Yes.

Q But you are saying behind that break is a chain link fence?

A Yes.

Q How far is the chain link fence from where the wood fence would be if it wasn't broken?

A Well, the wood fence is still there, but the chain link fence is behind it.

Q Like how far behind it?

A It's laying right up against it. I mean, it's, (indicating).

Q So it almost becomes the same continuous barrier?

A It is.

Q And what are those posts leaning against the fence in the rear of the yard, do you know?

A These are the same, like the post of the fence.

Q Are those the posts that are kind of like extras now that the wood part is missing?

A The wood paneling's still there; it's just broken. A tree fell during a storm and broke this part of the fence. So it's just leaned up against it, the other

43

we can see it, that fence is in the rear of your property until it reaches that garage?

A Yes.

Q That also serves as an enclosure for your property?

A Yes.

Q So are you saying that if we focused on the left center of this photograph, there's a section of fence that has kind of a reddish tint to it, do you see that?

A Yes.

Q And that's leaning against?

A Another fence.

Q Leaning against the chain link fence from the neighbor's yard?

A Yes.

Q So that's why you're saying that neither of your dogs could get into the neighbor's yard because even if they could get past this wooden fence, they would be met with a chain link fence that would stop them?

A Yes.

Q Okay. But they could probably get underneath this laying wooden panel while still remain on your property? In other words, it formed kind of a tent associated with the way it was leaning?

A Yes, but being the Saint Bernard, they would

46

A Yes.

Q If the dogs came from the backyard down the side of the house shown in photograph J, and therefore got into the front of the yard, could they get onto the driveway from that spot? Or would the fence stop them?

A If they came to the front of the yard from the backyard on the side of the house.

Q On the side shown in photograph J?

A Yes, they could get to the driveway.

Q Okay. So I have photograph F in front of you. Does that show how the dogs could get from the side of the house that does not have the driveway over to the driveway if they got to the front yard in photograph F?

A Yes.

Q So there's no barrier that would prevent the dogs from getting onto the driveway even if they came around the house on the side opposite the driveway?

A Yes.

Q Okay. And the condition of the various fences that we're looking at in these photographs is the condition they were in as of December 20, 2006 when the police came to your home?

A Yes.

Q Okay. I notice that at least one of the photographs had a "Beware of Dog" sign seen in the house?

47

A There's one there, in the back of the house.

Q All right. So now there's more than one?

A Yes, there's one on the front of the house right there as well.

Q Okay. So photograph H is your front door, and to the left of your front door is a sign that says, "Beware of Dog"; is that right?

A Yes.

Q All right. And now you've pointed to which one, sir?

A M.

Q Photograph M is the door?

A Back porch door.

Q Back porch door. And to the left as you look at that photograph of the door is another "Beware of Dog" sign?

A Yes.

Q Who put those signs up?

A I did.

Q And why did you put them up?

A So people would know there were dogs there.

Q Do you believe that if someone walked into your home and they were a stranger, that the dogs would attack them?

A Depending on how we responded to the person.

59

A Yes.

Q On your cell phone?

A Well, I got the phone call and K and Tashonna were on the phone. I can't say who was actually calling.

Q So you got one call?

A I got one call.

Q Now, was your mother present when the police first arrived or did your mother come over afterwards?

A When the police first arrived as during the shooting?

Q Yes.

A It would have been afterwards.

Q So the only ones home at the time when the shots were fired were Tashonna and K?

A Yes.

Q When you spoke to K afterwards, what did she tell you happened?

A Basic story that I got was she came home from school, let herself in the house, she was bringing the dogs out so they could go to the bathroom.

I don't remember if she had taken Deuce already or not. I don't think she did because I think I had to take him out after the fact.

And I think she walked outside with Seven, and Seven went to play with something or other. She was

60

standing outside, and that Seven heard something and bolted toward the front.

Q Okay. Did she tell you what part of the backyard she was in when Seven bolted to the front?

MR. SCHOENHORN: Object to the form. Are you asking about just in that initial conversation? Or at some later point?

MR. GERARDE: That's a good objection.

BY MR. GERARDE:

Q At that time did she tell you where she was when Seven bolted towards the front?

A At that time she did not tell me exactly where she was when he bolted toward the front.

Q Did she tell you at that time which side of the house Seven ran around, the driveway side or opposite the driveway side?

A Yes, she did.

Q What side did Seven bolt towards the front?

A He ran down the side of picture M.

Q Picture M, which is opposite the driveway?

A Yes.

Q And did there come a time when you learned where she and the dog, and Seven were right before Seven bolted around towards the front of the house?

A Yes. I don't remember exactly, but I believe

66

A Yes.

Q Okay. And she told you she heard the shots?

A Yes.

Q Did she tell you she saw the shots?

A She didn't see the shots. But she heard them.

Q What did she tell you about the shots?

A She told me she heard a couple of the shots.

And when she heard the shots, she came -- I guess she was in the kitchen or something of that nature. She was some point and when she heard the shots, she proceeded to come toward the front of the house.

She didn't see the third shot either, but by the time she got outside, the dog was already dead and K was already hysterical.

Q I think we have her name from one of the police reports, so I know who you're talking about. I just want to make sure that it's the same person. Is it Jonna Van Allen?

A That may be.

Q African-American female, about twenty-seven years old as of then? 3/19/79? Lives at 300 Enfield Street, does that sound right?

A Right -- No, 300 would be the person who lived across the street.

Q Right.

124

for rent?

A Tenants give me the rent.

Q In person?

A Yes. Yes.

Q Every time?

A Except for Section 8.

Q And where are those sent?

A To 67 Lebanon Street.

Q Okay. Your mother's address?

A Yes.

Q Do you have written leases with your tenants?

A Yes.

Q And are they in your name?

A Yes.

Q Two ninety-seven Enfield Street, you stated that you in November of 2006 lived on the first floor, correct?

A Yes.

Q And who lived on the second floor?

A No one.

Q What about the third?

A No one.

Q Why is it that the windows were boarded up?

A There was a burglary in which the window in the rear was broken.

Q Did you have homeowner's insurance?

131

fallen over, the wooden fence that's fallen over shown leaning, is it correct that you can't see the chain link fence behind that wooden fence past the wooden fence because the chain link fence ends prior to the wooden fence; is that correct?

A I'm not following you.

Q Okay. Does the chain link fence only get up to the part behind the wooden fence?

A Does it only get for this section, you are asking me?

Q Yes.

A No.

Q Okay, it goes past that?

A Yes.

Q Where?

A It goes all the way to the end.

Q And can you point to me where you see a chain link fence here?

A It's behind --

MR. SCHOENHORN: Do not answer the question.

Q No, I'm just asking --

MR. SCHOENHORN: I'm directing him not to answer. She just asked you to point to something that you said is not in the picture.

132

BY MS. FEOLA-GUERRIERI:

Q No, I just said can you point to and show me --

MR. SCHOENHORN: And if it's not in the picture, your answer is obvious then.

A It's not in the picture.

BY MS. FEOLA-GUERRIERI:

Q Okay. Is it your testimony, sir, that the chain link fence that -- is not shown in this picture?

A Yes.

Q Okay. That's correct, that's your testimony?

A Yeah.

Q Okay. But it exists there?

A Yes.

Q Okay. And so do you have any understanding as to why the chain link fence can't be seen in this photograph?

MR. SCHOENHORN: Objection, do not answer that question.

MS. FEOLA-GUERRIERI: Well, I think that's a fair question.

MR. GERARDE: That sounded like a pretty reasonable question.

MR. SCHOENHORN: Can you explain why you can't see something in the picture?

MS. FEOLA-GUERRIERI: Yes.

EXHIBIT SJ-2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A.	*
as guardian for K.H., a minor child	*
Plaintiffs	* CIVIL ACTION NO.
	* 3:08CV01644 (RNC)
vs.	*
	*
JOHNMICHAEL O'HARE,	*
ANTHONY PIA and	* JUNE 15, 2009
CITY OF HARTFORD	*
Defendants	*
	*

DEPOSITION
OF
JOHNMICHAEL O'HARE

Taken before Sandy K. Visentin, Registered
Professional Reporter and Notary Public in and for the
State of Connecticut, pursuant to the Federal Rules of Civil
Procedure, at the Law Offices of Jon L. Schoenhorn &
Associates, LLC, 108 Oak Street, Hartford, Connecticut, on
Monday, June 15, 2009, commencing at 1:06 p.m.

Sandy K. Visentin, LSR, RPR
CT Lic. #SHR.234
Andrews Reporting Service
330 Cook Hill Road
Cheshire, CT 06410
(203) 271-2190

1 A P P E A R A N C E S

2

3

4 REPRESENTING THE PLAINTIFF:

5 JON L. SCHOENHORN & ASSOCIATES, LLC
108 Oak Street

6 Hartford, CT 06106

By: Jon L. Schoenhorn, Esq.

7

8

9

10 REPRESENTING THE DEFENDANT:

11 HOWD & LUDORF, LLC

65 Wethersfield Avenue

12 Hartford, CT 06114-1190

By: Thomas R. Gerarde, Esq.

1 JOHNMICHAEL O'HARE,
2 Deponent, after first having been duly sworn
3 by the Court Reporter, testified as follows:

4

5

6 DIRECT EXAMINATION

7

8 BY MR. SCHOENHORN:

1 it's in some way difficult for you to answer, you have
2 the right during this deposition to ask me to rephrase,
3 use a different term. Sometimes I'm inartful and I
4 might ask a question with a double negative. If you're
5 not sure what I'm asking, you need to take the time to say
6 you need to rephrase your question or tell me you don't
7 understand it, some terminology I used if that's the case,
8 so that I am sure that you understood the question that I
9 asked.

10 A. Okay, I understand.

11 Q. And, finally, this is a general question that
12 I ask: Are you taking any medication or do you have
13 any kind of physical disability today that would prevent
14 you from understanding my question, processing the
15 information I'm seeking, and to accurately respond and
16 state the answer?

17 A. No, I'm not.

18 Q. Okay. With that, how long have you been a
19 Hartford police officer?

20 A. I have been an officer since June 1st, 2005.

21 Q. What did you do before that?

22 A. I worked at a restoration dry cleaning business in
23 Farmington.

24 Q. And I don't want to know your address but what
25 town do you live in?

1 A. We were driving back to -- actually, we were
2 driving to the hospital and I saw a party that we
3 recognized as George Hemingway and his street name
4 was Pimp, and I knew he was a gang member with the
5 Wes Hell gang out of Westland Street. He was in front
6 of 717 Garden, which we know as a Wes Hell hangout, so
7 I identified that.

8 Saw him standing out front. As soon as he
9 looked at our cruiser, he dropped something quickly and
10 walked away, started walking south on Garden Street.

11 Q. You keep using the term "we," I assume that's not
12 the royal we?

13 A. No.

14 Q. It's not the literary we?

15 A. No.

16 Q. Can you tell me who the other person or persons
17 you were with at the time that said this occurred with
18 Mr. Hemingway on Garden Street?

19 A. Officer Laureano, he was my partner.

20 Q. Do you remember which vehicle you were in?

21 A. I would have to review the report.

22 Q. Well, looking at Exhibit 1, look down to the
23 fourth line, it mentions Hartford Police cruiser 232?

24 A. That sounds about right. We shared five cruisers
25 amongst the unit. Oh, no, I see here --

1 MR. GERARDE: 231 it says.

2 THE WITNESS: I was in 231. 232 was a
3 different car.

4 BY MR. SCHOENHORN:

5 Q. Correct, okay. So as I read this report,
6 Officer Pia -- I guess that's why I needed to ask you to
7 clarify this -- the way it's written, it's unclear who's
8 operating cruiser 232. Can you tell us now who that would
9 be?

10 A. I'm not sure. I believe it would be Officer Pia.
11 I wasn't in that vehicle. I was assigned as unit 231, so
12 I'm assuming I was in cruiser 231.

13 Q. All right. Well, if you read this report, the
14 next sentence, the one that begins "At 1522 hours
15 Officer Pia and I responded to 297 Enfield Street in marked
16 police cruiser 232."

17 A. Correct. After when Officer Pia showed up on the
18 scene then, he was operating 232, I went with Officer Pia to
19 check the location in his vehicle.

20 Q. All right. Let's go back now to Garden Street for
21 a moment. You saw Mr. Hemingway, correct?

22 A. Yes, I did.

23 Q. Did you know him prior to that date?

24 A. Yes, I did.

25 Q. By sight?

1 A. By sight.

2 Q. Had you ever arrested him prior to December 20th,
3 2006?

4 A. I had not arrested him.

5 Q. Had you ever spoken to him before?

6 A. Yes, I had.

7 Q. What had you spoken to him about?

8 A. I know he came home from -- the only reason I knew
9 him was when he came home from jail, we were up on Westland
10 Street and Officer Laureano knew him and said, Hey, he just
11 came home on a gun charge, and we were talking at Garden and
12 Westland, somewhere in that neighborhood. And Laureano
13 relayed to me that Hemingway should be afraid because people
14 out there think he snitched in jail.

15 Q. Now, I just want to be clear about that.
16 Hemingway was not an informant for you, was he?

17 A. No, he was not.

18 Q. And, to your knowledge, he wasn't an informant for
19 Officer Laureano, was he?

20 A. Not that I know of.

21 Q. And when you first saw Mr. Hemingway, you knew him
22 to have a felony record, correct?

23 A. I knew he was home from a gun charge.

24 Q. Did you know if he was out on bond or had he been
25 convicted at that point?

1 A. I knew he had been convicted and served time.

2 Q. So he was then a convicted felon, as far as you
3 knew?

4 A. As far as I knew.

5 Q. And you also, as far as you knew, believed him to
6 be a member of a street gang?

7 A. Yes.

8 Q. And was that street gang known to you to be a
9 violent street gang?

10 A. Yes.

11 Q. Involving guns and weapons?

12 A. Yes.

13 Q. Was it also known to you to be a street gang that
14 involved the trafficking in narcotics?

15 A. Yes.

16 Q. Any other particular crimes that this particular
17 gang was known for?

18 A. Homicide.

19 Q. Do you have any reason to believe that
20 Mr. Hemingway himself was involved in a homicide as of that
21 date, as of December 20th, 2006?

22 A. As of -- no.

23 Q. I'm not asking about subsequent.

24 A. Right. No.

25 Q. And any time after December 20th, 2006, did you

1 ever have occasion to encounter Mr. Hemingway again?

2 A. Since then have I?

3 Q. Since then.

4 A. Yes.

5 Q. Were you involved at all in the arrest of
6 Mr. Hemingway for the charges for which he is currently
7 being held in lieu of bond?

8 A. No.

9 Q. Did you ever, subsequent to December 20th,
10 2006, participate in the actual physical arrest of
11 Mr. Hemingway?

12 A. No, I did not.

13 Q. So after you observed Mr. Hemingway drop
14 something and walk away on December 20th, 2006, what did
15 you do next?

16 A. Officer Laureano stated, What is that? Jumped
17 out, walked over to it, and it was heroin.

18 Q. When you say it was heroin, describe what you
19 saw?

20 A. It was packaged. I remember it was in a plastic
21 bag, packaged heroin. I don't recall the exact amount, but
22 it was more than one.

23 Q. And you observed him drop this right there on the
24 sidewalk?

25 A. Absolutely.

1 Q. He didn't run away?

2 A. He didn't run away, he started to walk.

3 Q. Where did he go?

4 A. Started walking south on Garden Street.

5 Q. What did you do, then?

6 A. Either I or Laureano told him to stop, I don't
7 know which one, and he complied.

8 Q. And were you still in the police car at that
9 time?

10 A. No, we stepped out.

11 Q. Both of you stepped out?

12 A. I can't testify for Officer Laureano but I stepped
13 out.

14 Q. Were driving or were you the passenger on that
15 day?

16 A. I believe I was the passenger. I'm not sure.

17 Q. You stepped out and did what?

18 A. I walked over and saw the heroin.

19 Q. I thought you just told me that Officer Laureano
20 stepped out and picked something up and said to you that it
21 was heroin?

22 A. No. He observed him drop it and said, He just
23 dropped something. And I went over and observed that it was
24 heroin.

25 Q. Then what did you do?

1 was handcuffed behind his back or in front?

2 A. I don't recall.

3 Q. Did you have any conversation with Mr. Hemingway
4 yourself?

5 A. I don't believe so.

6 Q. Did you hear him say anything to Officer Laureano?

7 A. I don't recall exact words but I know there was a
8 conversation.

9 Q. I'm not asking whether you knew there was
10 conversation, I'm asking whether you heard Mr. Hemingway say
11 anything to Mr. Laureano?

12 A. Well, I understood the question. I know
13 they were engaged in conversation, that's as far as I
14 remember.

15 Q. So as you're sitting here, you would not be able
16 to testify to anything that Mr. Hemingway said, right?

17 A. No, it's all third-party from Officer Laureano.

18 Q. Well, that's my question. You didn't hear
19 anything that he said?

20 A. No, I don't recall.

21 Q. You do recall them engaging in conversation?

22 A. Yes.

23 Q. Did the conversation occur after Mr. Hemingway
24 was in the police car or before he was placed in the police
25 car?

1 in the rear of the address on Vineland Terrace during this
2 entire time you're waiting there?

3 A. As we were waiting for Quan?

4 Q. Yes.

5 A. No, because we were out on the other side of the
6 house taking a look at the street to see if he was walking
7 down from his house that we knew to be on Auburn Street and
8 if he was walking to the house. We could view him. There
9 was a lattice on the front porch; we were behind the lattice
10 looking through.

11 Q. Did you hear a cell phone ring?

12 A. I don't recall.

13 Q. Did you observe Mr. Hemingway speaking a second
14 time on a cell phone?

15 A. Not a second time I don't believe, no.

16 Q. Well, the first time was the conversation
17 purportedly with Quan Morgan, that you were waiting for him
18 to arrive, right?

19 A. I believe so, yes.

20 Q. My question is, you had Officer Laureano tell
21 you, oh, change of plans, Mr. Morgan called back.
22 Did you see Mr. Hemingway speaking to anyone else a second
23 time?

24 A. Not that I recall, no.

25 Q. So what exactly did Officer Laureano tell you?

1 A. That the guns were up on Enfield Street,
2 297 Enfield Street. And, in fact, when we regrouped in the
3 backyard, George Hemingway I do remember reiterating it was
4 297 Enfield Street and there was an abandoned car in the
5 backyard.

6 Q. You heard Mr. Hemingway say --

7 A. I remember him saying 297 Enfield Street, yes.

8 Q. All right. Did you know the address of
9 297 Enfield Street?

10 A. No.

11 Q. Had you ever been in that yard before?

12 A. I may have, not that I recall. I worked that
13 neighborhood for a while. I don't know every specific
14 address of every house I go into or go in the backyards
15 of.

16 Q. Okay. Tell me again when you became a police
17 officer?

18 A. 2005, June 1st.

19 Q. So you had been a police officer for less than
20 18 months at the time of this incident, correct?

21 A. Correct. My entire time in the Northeast
22 neighborhood.

23 Q. So I'm going to ask you, do you recall having been
24 in the yard of 297 Enfield Street for any reason prior to
25 December 20th, 2006?

1 Q. For what period of time?

2 A. I'm not exactly sure. We were partners for a few
3 months.

4 Q. Did you consider him a social friend?

5 A. No, maybe hung out with him one or two times after
6 work.

7 Q. Have you talked to him about this case?

8 A. Yes.

9 Q. When was the last time you talked to him about
10 this case?

11 A. Just the fact that we were coming to depositions
12 yesterday.

13 Q. Did you go over your recollection of the events
14 with him?

15 A. I have in the past, yes.

16 Q. Did you ask him to tell you what his memory of the
17 matter was?

18 A. I don't believe I asked him; I believe it came up,
19 though.

20 Q. Did you ever ask him why none of this
21 information about waiting on Vineland Terrace and having
22 Mr. Hemingway in custody for a period of time is noted in
23 any reports?

24 A. No, I know why it's not reported.

25 Q. All right. Why don't you tell me?

1 A. I don't recall.

2 Q. So what did you do when you headed towards
3 297 Enfield Street?

4 A. We drove -- I'm not exactly sure how we drove. I
5 know we parked north of the house fearing, you know, because
6 we discussed the fact it could be a setup, an ambush, or
7 there still could be somebody there.

8 Q. Well, how far up did you park?

9 A. About a house maybe, two houses north of it.

10 Q. And this was a marked patrol car?

11 A. Yes.

12 Q. So your testimony is that you're going to
13 expect somebody maybe to drop off firearms and you parked
14 a marked patrol car one house up in plain sight on
15 Enfield Street?

16 A. Yeah, I'm not exactly sure of our route of
17 travel. We didn't want to park directly in front of the
18 house.

19 Q. So you parked one house up?

20 A. I would say one or two. I don't know the
21 exact address but it was north of there. I know it was
22 far enough north that we didn't believe that it would be
23 seen.

24 Q. How large are the lots on Enfield Street?

25 A. I don't believe they are very large.

1 Q. You parked in the same block as 297 Enfield

2 Street?

3 A. Yeah, I believe it's the same block.

4 Q. Did you park on the same side of the street as

5 297 or did you park on the opposite side of the street?

6 A. I believe we parked on the same side.

7 Q. Were you in uniform?

8 A. Yes, I was.

9 Q. Was Officer Pia in uniform?

10 A. Yes, he was.

11 Q. Tell me what you did?

12 A. We exited the vehicle, we walked south, we

13 identified the house, we saw it, proceeded cautiously

14 through the front open gate, and we proceeded to walk north

15 and then up along the north side of the house, which is like

16 a narrow passageway.

17 Q. And it's a passageway between what and what?

18 A. There's a small, probably waist high, chainlink

19 fence and the house.

20 MR. GERARDE: Can you have the record

21 reflect what's on the right and what's on the

22 left?

23 THE WITNESS: The north side is chainlink

24 fence and the south side is the house.

1 BY MR. SCHOENHORN:

2 Q. And as you're walking towards the back of
3 the house, the house would be on the left of that
4 passageway?

5 A. Yes, it would. When we were walking, the house
6 was on the left.

7 Q. Now, before you entered 297 Enfield Street, did
8 you communicate with anyone else about your location?

9 A. No, I don't believe so. Officer Laureano knew
10 where we were.

11 Q. Did you give any kind of information that you
12 were exiting your cruiser before you left the cruiser on
13 Enfield Street?

14 A. I don't believe so.

15 Q. Is there any protocol regarding if you're
16 leaving your cruiser and you're going into someone's
17 property about whether or not you have to let someone
18 else know that?

19 A. We're in the course of an investigation, we don't
20 call in every step of the way, so no.

21 Q. Now, did you obtain a warrant before you entered
22 the property?

23 A. No.

24 Q. To your knowledge, had Officer Pia obtained a
25 warrant?

1 A. No.

2 Q. To your knowledge, had Officer Laureano obtained a
3 warrant?

4 A. No.

5 Q. To your knowledge, did anyone seek to get a
6 warrant to search 297 Enfield Street?

7 A. No.

8 Q. You went to the Hartford Police Academy?

9 A. Yes, I did.

10 Q. Did you learn anything about warrants when you
11 were in the Police Academy?

12 A. Yes, I did.

13 Q. Did you ever take any subsequent courses or
14 receive any other training --

15 A. Sure.

16 Q. -- about preparation of search warrants?

17 A. Yes. Legal update classes, training days.

18 Q. So can you tell us why you didn't obtain a
19 warrant of any nature before you obtained 297 Enfield
20 Street?

21 A. It didn't require a warrant.

22 Q. Why not?

23 A. Because it wasn't inside a property. It wasn't
24 protected by curtilage.

25 Q. Do you know what curtilage is?

1 A. Yes, I do.

2 Q. What is curtilage?

3 A. The definition?

4 Q. Yes.

5 A. I can't give you verbatim, but I can tell you

6 that it's the intimacies attached to the house. When

7 somebody goes out of their way and puts up a fence that

8 you can't see through and goes out of their way to

9 afford protection for their yard so that would make

10 it impossible to see in or access it, it would be

11 within the -- it's not the open field, it's not far

12 enough away from the house but it's the immediate control

13 area of the house.

14 Q. Did this house have a driveway?

15 A. Yes, it did.

16 Q. Did you see any abandoned vehicle in the

17 driveway?

18 A. No, there was a dumpster in the driveway.

19 Q. Did you see any abandon vehicle past the

20 driveway?

21 A. You couldn't see past the driveway because of the

22 dumpster.

23 Q. Did you go into the next-door neighbor's

24 property to see what you could see through the back of the

25 yard?

1 A. No, we didn't need to.

2 Q. So you couldn't see the backyard from the street,
3 I take it?

4 A. You could see pieces of the backyard. You
5 couldn't see the entire backyard because the house was
6 there.

7 Q. And you didn't see any vehicle in the back of the
8 house from the street, did you?

9 A. No, I didn't see a vehicle from the street, no.

10 Q. You didn't see any people or any animals from the
11 street; is that correct?

12 A. I didn't see anything.

13 Q. And I didn't know if I interrupted you, but have
14 you told me everything else that you believe constitutes
15 curtilage in your opinion?

16 A. Well, I know there's a better definition in the
17 red book, if I could review that. But, yes, off the top of
18 my head as we sit here, yes.

19 Q. Well, I'm not asking it as a quiz, I'm asking
20 you what your understanding of what it is as you sit here
21 today?

22 A. Well, when somebody goes out of their way to
23 prevent people from seeing or getting to their backyard, I
24 assume that's attached to the everyday lives of somebody and
25 they expect some privacy back there.

1 Q. Now, in your report on Exhibit 1, it
2 states here that you parked in front of it looks like
3 305 Enfield Street. Do you see that? It's about six
4 lines down. The second to the last line of that first
5 paragraph.

6 A. Yes, I see that, 305.

7 Q. How far is 305 Enfield Street from 297 Enfield
8 Street?

9 A. I don't know. A house or two, maybe three.

10 Q. And how long did it take you to get from your
11 vehicle to the front of 297 Enfield Street on foot?

12 A. Probably less than 30 seconds, I'm not sure.

13 Q. Now, the next sentence states that there was
14 a partial fence in front of the house but there was no
15 gate in front of the driveway or front walkway. Do you
16 see that?

17 A. I do.

18 Q. Can you tell me what you meant by a partial
19 fence?

20 A. Well, it went across, it stopped at the gate, the
21 gate was open, and then it went across to the driveway and
22 there was absolutely no way of stopping or blocking the
23 driveway. It was a wide driveway, it was unfenced or
24 unchained.

25 Q. I just want to be clear. It says there was no

1 gate in front of the front walkway. That's inaccurate,
2 correct?

3 A. Right.

4 Q. There was a gate, it's just that it was open,
5 correct?

6 A. Correct. As I wrote the report, I see that that
7 was not clear.

8 Q. Okay, and that's why I'm trying to get it
9 clarified.

10 A. Okay.

11 Q. In any event, you entered the front walkway?

12 A. Yes.

13 Q. You didn't close the gate behind you?

14 A. I didn't see why we would, no.

15 Q. And you went around to the right as you faced the
16 house, correct?

17 A. Correct.

18 Q. Now, was there a fence on the right side of the
19 property?

20 A. There was the same style chainlink fence on the
21 right side of the property.

22 Q. That went all of the way to the back of the
23 property, correct?

24 A. I don't know how far it went back.

25 Q. Well, it went at least as far back as you were

1 walking, correct?

2 A. I believe so.

3 Q. And as you went in that space between the house
4 and the fence, how far would you say you got towards the
5 rear of the property?

6 A. I got right to the back of the house.

7 Q. So the corner of the house?

8 A. Correct.

9 Q. As we're sitting here now, would that be the
10 northwest corner?

11 A. That would be the northwest corner, yes.

12 Q. And what did you observe from that location?

13 A. Well, I mean, we stopped short just in case there
14 was anybody in the backyard or there was, you know, an
15 ambush. And I peeked around the corner and I saw in the
16 southwest corner I saw a bunch of looked like a wooden fence
17 but I think they were propped against the fence, and I saw a
18 dog come out from a piece of fence that was attached or
19 pushed against the fence or something and I saw him come out
20 in the southwest corner. And he was startled, he looked
21 directly at us.

22 Q. What you could see from that corner, was there
23 either a building or fencing around the backyard?

24 A. My focus was directly at the dog, I don't recall
25 what else I saw.

1 A. Yeah, it does. Yes.

2 Q. Keeping in mind also it's somewhat in shadow,
3 would you just show the spot you went to on this. If you
4 can make it bigger than that so I can see it.

5 A. It's still hard to see.

6 MR. GERARDE: With the understanding it's not
7 to scale.

8 MR. SCHOENHORN: Right.

9 BY MR. SCHOENHORN:

10 Q. And just so that we don't mix these up, can you
11 put your initials on this Exhibit 2. Anywhere.

12 A. Okay.

13 Q. And also on Exhibit 3.

14 A. Okay.

15 MR. GERARDE: So it's clear, he's given you a
16 word response that I think is more accurate than
17 this marking.

18 MR. SCHOENHORN: Oh, I agree.

19 MR. GERARDE: He told you he reached the back
20 corner of the house, and so to the extent that
21 might not quite reach the back part of the
22 house he did testify he reached the back corner of
23 the house.

24 MR. SCHOENHORN: I agree.

25

1 A. He told me a piece of it, yes.

2 Q. What did he tell you?

3 A. He just said he saw the dog in the middle of the
4 yard.

5 Q. In the middle of the front yard?

6 A. He said when he looked in the back he saw it in
7 the middle of the backyard.

8 Q. Okay. So the dog came from behind the fence, and
9 how far did it approach you before you turned around and
10 left the corner?

11 A. Like I said, it stopped, it looked at us and then
12 it immediately became -- it rushed in rage right at us, so I
13 turned around immediately.

14 Q. What do you mean by raged at you?

15 A. Well, it stopped, it looked at us, and then I just
16 heard like a low growl, like grrrrr, and it just shot right
17 at us and came at us. I mean, it was a split-second
18 reaction, I turned and yelled Dog, run.

19 Q. And where did you run?

20 A. We ran back along the side of the house towards
21 the front yard.

22 Q. Did you run out the same way you came in?

23 A. Yes, I did. I ran out to the front yard the same
24 way. I ran up the front, up the same alleyway.

25 Q. And when you got to the front, did you go out the

1 gate?

2 A. I don't recall because I remember telling
3 Officer Pia to hit the fence, and then I remember turning
4 around and seeing the dog come around the corner. I was
5 in the front yard and I could hear it, I could feel it,
6 I remember looking back when I was running, it was
7 gaining on us. I turned around in the front yard -- I
8 mean, I heard it so I wanted to turn to face it because I
9 didn't think I could outrun it, and I turned around and I
10 saw it and it was coming around the front corner of the
11 house.

12 Q. And what did you do then?

13 A. It came at me. It was coming around the corner
14 of the house. As I turned around, I drew my service
15 revolver -- service pistol, I'm sorry, I was walking
16 backwards, yelling out. I was trying to startle the
17 dog to buy some time, hoping it would stop. I
18 started yelling, Get back. I was screaming, Get back,
19 get back, get back. Not that I thought a dog would
20 understand that, but I figured maybe I could scare it a
21 little bit.

22 It momentarily, like, hesitated, it stopped
23 for a second, and then it just started twisting its head,
24 and there was like a low growl, like a dog would do when it
25 was about to attack. It started, you know -- I don't know

1 how to make the noise for her but it was turning its head,
2 it was snapping its teeth and it was growling, it was coming
3 to get me.

4 Q. And then what did you do?

5 A. I waited until I was on top, I knew I had to shoot
6 down at it. If it kept coming, I knew I would have to shoot
7 and I didn't want to shoot straight ahead. So as it came at
8 me, it jumped and I just remember going tat-tat-tat, three
9 times, really fast.

10 MR. SCHOENHORN: Let's go off the record for
11 a second.

12

13 [Briefly off record.]

14

15 BY MR. SCHOENHORN:

16 Q. When you said for Officer Pia to hit the fence,
17 what does that mean?

18 A. Jump the fence, basically. I mean, I don't
19 recall why I -- I know what I meant when I said it,
20 I remember saying it because I remember saying hit the
21 fence. In my terminology, I was telling him to jump over
22 that fence.

23 Q. You were behind him, correct?

24 A. Correct.

25 Q. Did you follow him over the fence?

1 A. I don't even know if he made it over the fence,
2 but no, I did not follow him over the fence.

3 Q. Did you go out the gate?

4 A. No, I turned around in the front yard and he
5 was right there. I didn't have time to make it out of the
6 gate.

7 MR. GERARDE: I missed the pronoun, he said
8 he was right there.

9 BY MR. SCHOENHORN:

10 Q. Who was right there?

11 A. The dog.

12 Q. What kind of dog was it? Describe it?

13 A. I later found out it was a St. Bernard. It was
14 just a large brown and white dog.

15

16 [Plaintiff's Exhibit 5: Marked for
17 identification.]

18

19 BY MR. SCHOENHORN:

20 Q. Now, I'm going to show you what's been marked as
21 Exhibit 5 and I'm going to ask you whether or not this
22 picture shows the location where you stopped and turned
23 around and faced the dog?

24 A. The location is in here, yes, it was close to the
25 front walkway here.

1 Q. Right. Would you be able to put the letter J
2 where you were standing where you stopped and faced the dog
3 and drew your service weapon?

4 A. I honestly don't recall exactly where I was, so
5 could draw you a big J that will cover a larger area, but I
6 don't remember specifically where I was standing. I recall
7 walking backwards over this sidewalk. It happened so fast I
8 can't tell you exactly where I was when certain events
9 transpired.

10 Q. Well, I guess the question is can you tell me
11 why you didn't go out the gate if you were walking
12 backwards?

13 A. Because there was no way I could have outrun that
14 dog.

15 Q. But you said it stopped?

16 A. It stopped momentarily probably for maybe half
17 a second to a second, and I'm not going to go on the
18 assumption that that's it, game over, and turn my back to
19 it.

20 Q. Well, when you said you were moving backwards, you
21 weren't moving back at a running speed, were you?

22 A. No, I was stepping backwards.

23 Q. When you were yelling at it and saying get back,
24 whatever you were saying to it, had you already stopped at
25 that moment or were you moving backwards?

1 A. The dog was only a few feet away from me at that
2 point.

3 Q. When you shot the dog, did it go down right where
4 it was or did it keep moving?

5 A. No, it stopped instantaneously. I can't say that
6 the momentum didn't carry it somewhere or not, I don't know.
7 But when I shot the dog, it instantaneously hit the ground
8 and stopped.

9 Q. It's your testimony, and I want to be clear about
10 this, all three shots were fired, one right after another
11 without --

12 A. Rapid succession.

13 Q. Rapid succession was the word I was looking for.

14 A. Yes, sir.

15 Q. Or two words I was looking for. Is that correct?

16 A. Yes, sir, it was pop pop pop.

17 Q. Could you also just put your initials on this
18 photograph.

19 A. [Witness complying].

20 Q. When you entered the yard, did you see any signs
21 on the house, such as No Trespassing or Beware of Dog or
22 anything like that?

23 A. I know there was a Beware of Dog from looking at
24 photographs. I don't recall at that time if I saw it or
25 not.

1 Q. You weren't looking, I take it, for signs?

2 A. Well, I mean, I see a lot of Beware of Dog,
3 No Trespassing signs all of the time. Not that I don't pay
4 attention to them but, you know, it appeared to me to be an
5 abandoned house based on the fact that there was a dumpster
6 in the driveway. I just assumed it was something that had
7 been up there for a while.

8 Q. Were any of the windows in the front boarded up
9 with plywood or anything?

10 A. Not that I recall.

11 Q. Were there any vehicles in the driveway at all?

12 A. I don't believe there were. All I remember seeing
13 is a dumpster.

14 Q. Was there anything in particular, other than the
15 dumpster, that would lead you to believe that the property
16 was abandoned?

17 A. I think that there was no vehicles. It was -- I
18 mean, I can't say definitively yes I believe it to be
19 abandoned but it appeared it was maybe under construction,
20 which is based on the fact that there was a giant dumpster
21 in the driveway.

22 Q. Well, dumpster also may suggest renovations,
23 doesn't it?

24 A. Correct.

25 Q. And is there anything that you haven't mentioned,

1 A. Yes, I do.

2 Q. Was it on your utility belt?

3 A. Yes, it was.

4 Q. Did you have any type of pepper spray on your
5 utility belt?

6 A. Yes, I did.

7 Q. Why didn't you use that?

8 A. I didn't really think that was going to work at
9 the time.

10 Q. And after you heard Officer Pia say something
11 along the lines of shots fired, what code did you hear him
12 use?

13 A. I believe he said ten-eighty-one, and that's our
14 common code for shots fired. I remember it was either
15 shots fired or ten-eighty-one, I don't recall exactly.

16 Q. Did he give the address?

17 A. I don't know.

18 Q. Then what happened?

19 A. Then I recall being on the front lawn and I
20 recall a girl coming from behind me, I couldn't recall
21 the age, and she went down to the dog. I mean, I turned
22 my attention to Officer Pia for a few seconds. I
23 remember him calling or radioing it in, and then from
24 behind me I don't know whether she came from the door or
25 the driveway, probably a 11- or 12-year-old girl, I'm

1 assuming, came to the dog. I don't remember much after
2 that except momentarily -- well, I don't know how much
3 longer somebody came out the front door and said, Who shot
4 my motherfucking dog? And as this was going on, I remember
5 hearing sirens and officers pulling up.

6 Q. Did you hear the girl saying anything, this
7 10-, 11-year-old girl?

8 A. Not that I recall, no. I just remember her going
9 to the dog.

10 Q. And I want to be clear about this, you said you
11 heard her coming from behind you?

12 A. Well, at this point I was focusing towards the
13 street. I was at an angle. I remember seeing Officer Pia
14 calling it in. He called it in and I remember kind of
15 scanning real quick and then I hear somebody coming from
16 behind me, whether it be the daughter -- I don't know where
17 she came from honestly, I don't recall, either the driveway
18 or from the front door.

19 Q. Are you saying you turned your attention away from
20 the dog without checking to see if he was dead?

21 A. He appeared to be dead, he wasn't moving.

22 Q. And how soon after you shot the dog did you hear
23 the girl coming?

24 A. I don't recall. I'm assuming within 20 seconds,
25 maybe, somewhere in that neighborhood. I don't recall,

1 honestly. Everything seemed to happen so fast that I don't
2 recall.

3 Q. And you said that you didn't see where she came
4 from, then why do you suggest she came out of the front
5 door?

6 A. Well, she came from behind me. She either came
7 from -- I would have seen her coming from the left because I
8 was kind of towards Officer Pia who was out front, so she
9 either came out the door or came up the driveway. Honestly,
10 I just know that she appeared from behind me and came over
11 to the dog. As I turned my attention, she was going towards
12 the dog. I would assume, based upon what I saw, she came
13 from the driveway but I don't know. I never saw where she
14 came from.

15 Q. Did you hear her say, Don't shoot my dog?

16 A. No, I never heard her say anything like that.

17 Q. And tell me about the girl. After you saw her,
18 what did she do?

19 A. I know she went down to the dog and it appeared
20 that she was upset with the dog.

21 Q. Was she crying?

22 A. I think she was crying. I don't exactly recall.

23 Q. Did you hear her outloud crying; that is, verbally
24 or audibly crying?

25 A. Honestly, I don't recall. I was under a bit of

1 stress myself at that point. I don't recall exactly what
2 people were doing. I just know that she appeared to be
3 shaken. Whether I saw her crying or not, I don't recall.
4 But I know she bent down to the dog as if that was her dog
5 or she was upset or something. Something I figured I would
6 do in that circumstance.

7 Q. What did you do then?

8 A. At that point, officers were arriving on the
9 scene. I remember the lady -- when she walked out the front
10 door and said, Who shot my motherfucking dog, I remember
11 consciously not addressing her. And then as officers came
12 to the scene, I think Officer Pia walked up towards her, I
13 walked towards I believe it was the lieutenant, it might
14 have been Sergeant St. John, you know, to a supervisor, and
15 I said, I just shot the dog.

16 Q. Did you talk to the girl?

17 A. No, I didn't talk to any girl. Not that I recall.

18 Q. The little girl?

19 A. The little girl, no, I don't believe I talked to
20 her at all, no.

21 Q. You didn't tell her, Your dog's dead?

22 A. No, I would not have done that.

23 Q. You didn't hear her yelling, Help my dog, do
24 something to help my dog?

25 A. Not that I recall, no. I mean, honestly, at that

EXHIBIT SJ-3

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A.	*
as guardian for K.H., a minor child	*
Plaintiffs	* CIVIL ACTION NO.
	* 3:08CV01644 (RNC)
vs.	*
	*
JOHNMICHAEL O'HARE,	*
ANTHONY PIA and	* JUNE 3, 2009
CITY OF HARTFORD	*
Defendants	*
	*

DEPOSITION
OF
ANTHONY PIA

Taken before Sandy K. Visentin, Registered
Professional Reporter and Notary Public in and for the State
of Connecticut, pursuant to the Federal Rules of Civil
Procedure, at the Law Offices of Jon L. Schoenhorn &
Associates, LLC, 108 Oak Street, Hartford, Connecticut, on
Wednesday, June 3, 2009, commencing at 2:11 p.m.

Sandy K. Visentin, LSR, RPR
CT Lic. #SHR.234
Andrews Reporting Service
330 Cook Hill Road
Cheshire, CT 06410
(203) 271-2190

6

1 ANTHONY PIA,

2 Deponent, after first having been duly sworn

3 by the Court Reporter, testifies as follows:

6 DIRECT EXAMINATION

7

8 BY MR. SCHOENHORN:

9 Q. Could you state your name and business address for
10 the record?

11 A. It's officer Anthony Pia, 50 Jennings Road,
12 Hartford, Connecticut.

13 Q. Can you just give me your thumbnail biography
14 starting with high school and where you went to school after
15 that, when you got a job at the police department?

16 A. Graduated from Southington High School, 1999,
17 Southington, Connecticut, and was hired in Hartford in
18 December of 2004.

19 Q. And to be a patrol officer?

20 A. Yes.

21 Q. You attended the Hartford City Police Academy,
22 correct?

23 A. That's correct.

24 Q. When did you finish the academy?

25 A. I believe it was June 1st, 2005.

1 A. By sight.

2 Q. Had you ever arrested him prior to December 20th,
3 2006?

4 A. I had not arrested him.

5 Q. Had you ever spoken to him before?

6 A. Yes, I had.

7 Q. What had you spoken to him about?

8 A. I know he came home from -- the only reason I knew
9 him was when he came home from jail, we were up on Westland
10 Street and Officer Laureano knew him and said, Hey, he just
11 came home on a gun charge, and we were talking at Garden and
12 Westland, somewhere in that neighborhood. And Laureano
13 relayed to me that Hemingway should be afraid because people
14 out there think he snitched in jail.

15 Q. Now, I just want to be clear about that.
16 Hemingway was not an informant for you, was he?

17 A. No, he was not.

18 Q. And, to your knowledge, he wasn't an informant for
19 Officer Laureano, was he?

20 A. Not that I know of.

21 Q. And when you first saw Mr. Hemingway, you knew him
22 to have a felony record, correct?

23 A. I knew he was home from a gun charge.

24 Q. Did you know if he was out on bond or had he been
25 convicted at that point?

1 A. I knew he had been convicted and served time.

2 Q. So he was then a convicted felon, as far as you
3 knew?

4 A. As far as I knew.

5 Q. And you also, as far as you knew, believed him to
6 be a member of a street gang?

7 A. Yes.

8 Q. And was that street gang known to you to be a
9 violent street gang?

10 A. Yes.

11 Q. Involving guns and weapons?

12 A. Yes.

13 Q. Was it also known to you to be a street gang that
14 involved the trafficking in narcotics?

15 A. Yes.

16 Q. Any other particular crimes that this particular
17 gang was known for?

18 A. Homicide.

19 Q. Do you have any reason to believe that
20 Mr. Hemingway himself was involved in a homicide as of that
21 date, as of December 20th, 2006?

22 A. As of -- no.

23 Q. I'm not asking about subsequent.

24 A. Right. No.

25 Q. And any time after December 20th, 2006, did you

1 yourself on December 20th, 2006?

2 A. I don't believe so.

3 Q. Do you recall whether Mr. Hemingway was in the
4 rear of Mr. Laureano's patrol car when you approached?

5 A. When I approached, I don't remember but he was at
6 one point in the rear of Officer Laureano's cruiser.

7 Q. On that day?

8 A. On that day.

9 Q. On December 20th?

10 A. Correct.

11 Q. Did you get out of your patrol car at the location
12 where Laureano and Hemingway were?

13 A. I can't remember exactly.

14 Q. Do you recall whether Officer Laureano conveyed to
15 you information in person or over the radio?

16 A. He relayed information to me in person.

17 Q. Had you ever used George Hemingway as an informant
18 before?

19 A. No.

20 Q. Had you ever used him as a basis to obtain either
21 a search warrant or an arrest warrant before?

22 A. No.

23 Q. Would you consider George Hemingway to be a
24 concerned citizen?

25 A. You could say that, yes.

1 Q. Did he suggest you do anything on that day?

2 A. I think it was a mutual agreement that if we had
3 information there was guns in a particular place we would
4 attempt to go find them.

5 Q. Well, let's go back. Tell me exactly what
6 Officer Laureano, to the best of your recollection, the
7 words he used to tell you what he had learned?

8 A. I couldn't tell you the exact words he used, but
9 he did relay information that there was possibly two
10 firearms before 297 Enfield Street.

11 Q. Did Officer Laureano indicate to you how it was
12 that he had learned this information?

13 A. Again, I don't know the exact words he used
14 but he had informed us that he got the information from
15 George Hemingway.

16 Q. Did Officer Laureano indicate to you whether or
17 not Hemingway had a source for his information that was
18 conveyed?

19 A. I don't remember that exactly.

20 Q. Do you recall whether Officer Laureano indicated
21 in any way to you that afternoon whether or not
22 Mr. Hemingway had personal knowledge about the existence of
23 guns based on having himself either seen them or other
24 personal direct knowledge about it?

25 A. Can you restate the question, you lost me in the

1 Officer Laureano told you about these guns on Enfield Street
2 that suggested that Mr. Hemingway had personal knowledge as
3 to having seen those weapons at that location?

4 A. As far as I remember, there was information that
5 he had personally seen or personally known there was. I
6 don't know how he received that information. I couldn't
7 tell you that for sure.

8 Q. So as you sit here now, your testimony is that
9 Officer Laureano told you that Mr. Hemingway had seen guns
10 located on Enfield Street?

11 MR. GERARDE: Object to the form. He said
12 that was his impression.

13 MR. SCHOENHORN: Well, I'm trying to narrow
14 that down. There's a lot of things you can have
15 an impression about.

16 BY MR. SCHOENHORN:

17 Q. Did he tell you that Mr. Hemingway had, in fact,
18 seen guns on Enfield Street?

19 A. I don't recall the exact word-for-word
20 conversation that I had with Officer Laureano.

21 Q. Is it to the best of your recollection that the
22 information was based on firsthand knowledge of
23 Mr. Hemingway and not on thirdhand hearsay or rumor?

24 A. Again, my impression was that it was firsthand
25 knowledge.

1 Q. Did Officer Laureano inform you as to when
2 Mr. Hemingway had obtained the information concerning guns
3 somewhere on Enfield Street?

4 A. Can you restate that again?

5 MR. SCHOENHORN: Actually, could that just be
6 reread to you.

7

8 [Question read back.]

9

10 THE WITNESS: I don't know the exact
11 conversation again, but I do know that it was
12 supposed to be -- the guns were supposed to either
13 have just been placed there or were being in the
14 process of being placed there.

15 BY MR. SCHOENHORN:

16 Q. Did he say anything about an abandoned car being
17 located on Enfield Street?

18 A. He did.

19 Q. And having added that information to refresh your
20 recollection, tell me everything you remember
21 Officer Laureano told you, even if it's not verbatim, but
22 all of the information he gave you concerning this
23 information from Mr. Hemingway?

24 A. Not verbatim, but generally it was that there was
25 one or possibly two firearms either just recently placed or

1 being in the process of being placed in or around the
2 abandon car in the rear of 297 Enfield Street.

3 Q. And what did you do when you received this
4 information?

5 A. We responded to that address.

6 Q. Who is "we"?

7 A. Myself and Officer O'Hare.

8 Q. In one patrol car?

9 A. Correct.

10 Q. Where was Mr. Hemingway when you departed to go to
11 Enfield Street?

12 A. He was with Officer Laureano.

13 Q. Where physically?

14 A. I don't remember exactly where.

15 Q. You indicated at one point he was in the rear of
16 Officer Laureano's patrol car, correct?

17 A. Correct.

18 Q. Was he in the rear of Officer Laureano's patrol
19 car when you departed from the encounter with
20 Officer Laureano and Mr. Hemingway?

21 A. I don't remember exactly.

22 Q. Well, when in the course of your arrival and
23 before your departure at Garden Street was Mr. Hemingway in
24 the rear seat of Officer Laureano's patrol car?

25 A. I couldn't tell you exactly. Again, it was a long

1 been driving, including yourself?

2 A. Well, there was myself and Officer O'Hare in the
3 car, so it was one of the two of us.

4 Q. All right. And where did you pull up when you
5 arrived at 297 Enfield Street?

6 A. I don't know exactly where we parked, but I
7 believe we parked just a few houses north of the location.

8 Q. And is 297 Enfield Street near the intersection of
9 any other streets?

10 A. It is.

11 Q. What street is it near?

12 A. I would have to look at a map to tell you exactly,
13 but I believe it's just south of Westland and just north of
14 I believe it would be Rockville.

15 Q. Winchester?

16 A. Winchester.

17 Q. Would Winchester be north or south of the
18 location?

19 A. I would have to look at a map to tell you exactly.
20 It's in the vicinity.

21 Q. Fair enough. Did you get out of the vehicle
22 somewhere on Enfield Street?

23 A. Yes, I did.

24 Q. Did you observe Officer O'Hare get out of the
25 vehicle on Enfield Street?

1 A. Yes.

2 Q. Did you have a warrant to go onto the property of
3 297 Enfield Street?

4 A. No, we did not.

5 Q. And as you're sitting here now, after you got out
6 of your vehicle on Enfield Street, did you radio in to
7 anyone about your arrival and about your departure from your
8 vehicle on Enfield Street?

9 A. I don't recall.

10 Q. Is it likely, based on your practice, procedure
11 and training, that you would have, or is it likely that you
12 did not make any communication to any other officer about
13 your leaving your vehicle?

14 A. Can you restate that?

15 Q. Yeah. Is it more likely that you did or more
16 likely that you did not communicate to either dispatch or
17 another officer that you were leaving your vehicle and
18 investigating on Enfield Street?

19 A. It's more likely that we did not.

20 Q. And why not?

21 A. Because we wouldn't want anybody else to come
22 through again and interrupt the possibility of somebody
23 being back there hiding the firearms.

24 Q. Are you telling us then, under oath today, that
25 the information that you had was that the placing of

1 Q. Well, first of all, can you indicate which way you
2 went? Obviously, you came back again but would you be able
3 to trace the route you went? And you went towards the
4 backyard, correct?

5 A. Correct.

6 Q. Would you be able to on that photograph indicate
7 which side of the house where you went from the front yard
8 and which side of the house you went on?

9 A. Yes, I can indicate that.

10 Q. All right. Here's a Sharpie, if you want to just
11 draw right on the --

12 MR. GERARDE: Can I ask just you, are you
13 asking him to start at the sidewalk and draw his
14 path?

15 MR. SCHOENHORN: Correct. Not his way back.

16 MR. GERARDE: To the farthest point he got
17 into the backyard before he turned around?

18 MR. SCHOENHORN: Yes.

19 MR. GERARDE: Can you do that?

20 THE WITNESS: I can tell you what side of the
21 house we went on. I don't remember if we entered
22 through the driveway or the gate.

23 BY MR. SCHOENHORN:

24 Q. Okay. But you did cross on the front yard of that
25 property?

1 motor vehicle --

2 A. Yes, right.

3 Q. All right. So you have drawn a line with some
4 carets that indicate to the side of the house as you're
5 facing the house it would be the right side of the house as
6 you face it from the street, correct?

7 A. Correct.

8 Q. And your testimony is that that's the north side
9 of the property?

10 A. That would be the north side, yes.

11

12 [Plaintiff's Exhibit 3: Marked for
13 identification.]

14

15 BY MR. SCHOENHORN:

16 Q. Now, I'm going to show you another satellite
17 picture, Exhibit 3, and ask you whether or not this
18 picture -- and I realize that it's a little bit dark but
19 that's the best I can do with this type of view from the
20 satellite. Would you be able to indicate on Exhibit 3 the
21 location with an X as to how far you came up the side of the
22 property before you turned around?

23 A. The picture is really bad.

24 MR. GERARDE: Do you have your bearings? You
25 have to see where the street is.

1 MR. GERARDE: While he's approaching the
2 backyard?

3 BY MR. SCHOENHORN:

4 Q. While you were approaching the backyard?

5 A. While we were approaching the backyard, we could
6 hear movement in the backyard.

7 Q. Did you hear any voices?

8 A. Did not hear voices.

9 Q. Did you hear any barking?

10 A. Did not hear any barking at that time.

11 Q. When you said you heard movement, can you describe
12 it in any more detail?

13 A. Not really. Just a rustling. Something moving in
14 the backyard.

15 Q. Did you ever reach a point along the side of that
16 house where you were able to have a clear view of the
17 backyard of that residence as you were heading there behind
18 Officer O'Hare?

19 A. A partial view.

20 Q. And what did you observe?

21 A. We observed a large dog.

22 Q. Where did you observe it?

23 A. I don't remember exactly where the dog was but I
24 remember it was facing us.

25 Q. Describe the dog?

1 A. From my report here, I have a large brown and
2 white dog.

3 Q. From after the fact do you recall that it was a
4 St. Bernard?

5 A. I do recall that, yes.

6 Q. And do you recognize it as a St. Bernard, the type
7 of dog that you see in these movies that are in the Swiss
8 Alps with barrels under their necks, right?

9 A. I guess you could say that.

10 Q. It wasn't the first time you had ever seen a
11 St. Bernard?

12 A. No, it was not.

13 Q. You didn't think it was a Pit Bull, did you?

14 A. No, I didn't think it was a Pit Bull.

15 Q. Do either of these photographs, either Exhibit 3,
16 2 or 4, show the spot where you first observed the dog?

17 MR. GERARDE: Where the dog was when he first
18 saw it?

19 BY MR. SCHOENHORN:

20 Q. Yes, where the dog was when you first observed
21 it?

22 A. I can give you a general area, I can't pinpoint it
23 exactly.

24 Q. All right. First of all, what picture are you
25 referring to?

1 A. I believe we observed the dog pretty much
2 simultaneously.

3 Q. And what did you do when you saw the dog?

4 A. Ran.

5 Q. So I assume you first turned around?

6 A. Correct.

7 Q. Now, before you turned and ran, did you hear the
8 dog?

9 A. Let me see. Yeah, the dog did advance towards us
10 while growling. I think that's what initially set the
11 running off.

12 Q. And describe what you mean by advancing towards
13 you?

14 A. Began to walk in our direction.

15 Q. And you turned and ran?

16 A. Officer O'Hare yelled "run" to me pretty much
17 simultaneously as I was turning to run.

18 Q. And tell me where did you run?

19 A. I ran what would be eastbound back along the north
20 side of the house.

21 Q. And where did you go?

22 A. When I reached the front of the house, I began to
23 run that would be kind of southeast, across the front of the
24 yard.

25 Q. Did you go out where the driveway is?

1 A. I did go towards the driveway, yes.

2 Q. Did you go out to where the driveway is?

3 A. I believe I made it to about the driveway and the
4 sidewalk area.

5 Q. Was it your intention to keep running towards
6 Winchester Street if you had to?

7 A. I would have kept running, yes.

8 Q. Okay. And as you were running, did you turn
9 around at all?

10 A. I did.

11 Q. And what did you observe when you turned around?

12 A. I observed the dog was right on Officer O'Hare.

13 Q. Describe what you mean by right on him. Was he
14 physically on him?

15 A. No, it was very close behind him and it was
16 snapping at him.

17 Q. And did you stop running to observe this?

18 A. I slowed down somewhat while looking over to see,
19 you know, obviously to make sure Officer O'Hare was okay.

20 Q. What was Officer O'Hare doing?

21 A. He was yelling to the dog to get back.

22 Q. Did he have anything in his hands while he was do
23 doing that?

24 A. We both had our firearms in our hands at the
25 time.

1 Q. When did you take your firearm out?

2 A. When we approached the rear of the house.

3 Q. Before you saw any dog?

4 A. Correct.

5 Q. Why would you do that?

6 A. Under the circumstances, we were attempting to
7 possibly locate individuals stashing firearms. Also,
8 there's always a possibility that the information given
9 could have been a setup, some sort of ambush.

10 Q. Is that because you were not certain about the
11 trustworthiness of Mr. Hemingway?

12 A. There's always the possibility that somebody could
13 be setting you up.

14 Q. Well, did you have any reason to believe he might
15 because he was a gang member or for some other reason?

16 A. Sure, gang members have motivation to want to hurt
17 a cop.

18 Q. Had Mr. Hemingway ever given you any information
19 or tip that helped lead to the solving of any crimes before
20 that?

21 A. Not to me directly.

22 Q. Do you know whether he was registered as an
23 informant with the City of Hartford?

24 A. He was not registered, to the best of my
25 recollection.

1 Can I restate that? At the time, he was not
2 registered. If he was prior, I don't know.

3 Q. Okay. And as you were looking back and you saw
4 Officer O'Hare shouting to the dog, what did you next
5 observe yourself?

6 A. I didn't observe O'Hare actually fire the shots
7 but I did hear the shots, turned, and saw the dog drop.

8 Q. Did you continue to run towards Winchester Street
9 even after you had turned and looked?

10 MR. GERARDE: The first time you mean?

11 BY MR. SCHOENHORN:

12 Q. The first time?

13 A. Yes, I was continuing to run but my pace was
14 slowing down. Again, you know, if I had to go back and
15 assist Officer O'Hare and put myself in jeopardy with the
16 dog I would have.

17 Q. The dog had stopped or had slowed down as it
18 approached Officer O'Hare, is that correct, as he faced the
19 dog?

20 A. At one point he was facing the dog, I don't
21 remember seeing the dog stop myself.

22 Q. Well, Officer O'Hare wasn't running in reverse,
23 was he, like backwards at any point?

24 A. I believe he was back-pedaling.

25 Q. Did you see the dog jump on Officer O'Hare?

1 Q. Yes, the ones that would actually go to the edge
2 of the fence as opposed to where the fence -- you see the
3 fence ends there?

4 A. Correct, I was on the driveway side of those.

5 Q. Okay. Had you gone over the curb of the driveway,
6 and you see there's a little area, space, between those
7 walkway stones and the curb, raised curb, of the driveway?
8 Had you gotten over onto the pavement of the driveway is my
9 question?

10 A. I don't remember that exactly.

11 Q. And when you heard the shots, what did you do?

12 A. I was looking back, I heard the shots, I saw the
13 dog fall on the ground and I stopped running.

14 Q. And how much time was there between each of the
15 shots?

16 A. Less than a second between each shot.

17 Q. And how many shots did you hear?

18 A. I heard three shots.

19 Q. Is it your testimony that there was no delay
20 between the second and the third shots?

21 A. There was no delay.

22 Q. After the shots, did you hear anybody?

23 A. After the shots, I did see a young girl come out
24 of the front door of the house.

25 Q. Out of the front door of the house?

1 A. Correct.

2 Q. And what did she do?

3 A. She ran up to the dog, she was very upset.

4 Q. Did she say anything?

5 A. I remember her crying and, you know, I don't
6 remember exactly what she had said.

7 Q. Do you remember her saying any words at all?

8 A. She was saying things, I don't -- I couldn't tell
9 you exactly what she was saying.

10 Q. Do you recall her saying, Don't shoot my dog?

11 A. I don't recall that, no.

12 Q. Now, you testified that you saw the dog like
13 gnarling and leaping towards Officer O'Hare, correct?

14 A. I would say snapping. His jaw was snapping.

15 Q. And where was he snapping towards?

16 MR. GERARDE: What part of O'Hare, do you
17 mean?

18 MR. SCHOENHORN: Yes.

19 BY MR. SCHOENHORN:

20 Q. Well, in the report you say his leg?

21 A. Yeah, well, it was snapping towards his legs, you
22 know, when O'Hare was running.

23 Q. So isn't it true this dog, when it stands normal
24 on its four legs, the head is higher than Officer O'Hare's
25 legs?

1 vehicles at 297 Enfield Street?

2 A. I don't remember seeing any abandoned vehicles,

3 no.

4 Q. After the shots were fired, did you see any

5 abandoned vehicles at 297 Enfield Street?

6 A. I do not remember seeing any abandoned vehicles at

7 any point during that incident on that date.

8 Q. Did you attempt to determine whether there were

9 any abandoned vehicles on the property before you entered

10 that property?

11 A. Can you restate that again?

12 Q. Yes. Did you attempt to determine whether

13 there were any abandoned vehicles at that location before

14 you entered the property at 297 Enfield Street; that is,

15 from a public area, the street or the back side of the

16 street?

17 A. No, we did not do anything other than what I said

18 when we walked up.

19 Q. Why didn't you?

20 A. Well, if there was an individual back there in

21 the process of hiding the guns and we pulled up front and

22 looked down the driveway, we would have probably scared them

23 away.

24 Q. Well, you're saying would have this. Are you

25 telling me that, as you sit here today, that you believe the

1 information that was conveyed to you is that there was a
2 person about to place a firearm at that location and that's
3 why you went there immediately after your conversation with
4 Officer Laureano?

5 A. We believed there was a possibility that we could
6 possibly interrupt somebody in the process of it, yes.

7 Q. Did you observe that there was a "Beware of Dog"
8 sign in the front of the house in at least one location
9 before you entered the property?

10 A. I did not observe it prior to entering the
11 property.

12 Q. Did you observe it after you entered the
13 property?

14 A. No, I did not. I see it's in the pictures there
15 so . . .

16 Q. You never observed it, is what you're saying?

17 A. Not until the pictures, no.

18 Q. So not until today is what you mean?

19 A. Correct.

20 Q. Did this house look to you that it was occupied at
21 the time?

22 A. I couldn't say whether it was or wasn't.

23 Q. Let me ask it a different way. Did the house
24 appear to you to be an abandoned property, a vacant,
25 abandoned property on December 20th, 2006?

1 A. It would be hard to say. I mean, there was
2 a -- if I remember, I believe there was a dumpster or
3 something in the driveway maybe. It did appear that work
4 was being done on the house, but I couldn't tell you from
5 observation at that moment whether the house was occupied or
6 vacant.

7 Q. Well, there's a difference between vacant and
8 occupied, right?

9 A. Correct.

10 Q. So let me break it up. First of all, occupied
11 means that there's someone inside at that moment, right?

12 A. Right.

13 Q. Did you have any knowledge as to whether or not
14 anyone was inside the house at that time?

15 A. We had no knowledge whether there was or there
16 wasn't.

17 Q. Was there anything about the house that led you to
18 believe that the property itself was vacant, and that is
19 that it didn't have any residents because it was vacant,
20 whether they were inside or not?

21 A. Well, we had no information on that.

22 Q. Did you obtain a warrant before you entered the
23 property?

24 A. We did not obtain a warrant.

25 Q. In your training as a police officer, you learned

1 firearms located on 297 Enfield Street?

2 MR. GERARDE: In the rear yard?

3 THE WITNESS: We're referring to the
4 property.

5 BY MR. SCHOENHORN:

6 Q. In the property?

7 A. In the rear yard, yes, we had probable cause.

8 Q. And what was the basis for your probable cause,
9 according to what you believe?

10 A. Based on the information that was given to us by
11 Mr. Hemingway.

12 Q. Well, I want to be clear, Mr. Hemingway didn't
13 give you any information, correct?

14 A. Correct.

15 Q. It's whatever Officer Laureano told you --

16 A. The relayed information.

17 Q. Right. And if you're incorrect in what
18 Officer Laureano told you, then we would have to rely
19 on what Officer Laureano said and not your recollection,
20 right?

21 A. You could say that.

22 Q. Okay. Isn't it true, sir, from your training and
23 experience, that even if you have probable cause you need to
24 have a warrant to search private property?

25 MR. GERARDE: Objection to the form. It's

1 that area, then I would say yes.

2 Q. Did you make a determination that the owners or
3 occupants of 297 Enfield Street did not have an expectation
4 of privacy in their side or rear yard on December 20th,
5 2006?

6 A. Based on the way the property was set up, I would
7 say no, they did not.

8 Q. Tell me what you mean by that. How was it set up
9 that made you think they didn't have an expectation of
10 privacy?

11 A. There was many openings around the yard. The
12 driveway was not fenced off, the gate was not closed, and I
13 didn't see any no trespassing signs or anything to the
14 effect to keep people out of the property.

15 Q. What do you mean there were openings in the
16 property? What do you mean by that?

17 A. Throughout the fenced-in area there were several
18 openings in the fence. I think you can even see from this
19 picture, and I don't know if we have better pictures, of
20 there might actually be a part of the fence that's actually
21 bent over or down in one part of the yard. And there's a,
22 to the best of my recollection, a gap in this corner, which
23 would be the southwest corner of the yard, which I know that
24 individuals from that area use as a cut in the past. And
25 when I say cut, I refer to an area where they would pass

1 who was an occupant of 297 Enfield Street after the
2 shooting?

3 A. I did not see him.

4 Q. Did you hear him?

5 A. I did not hear him. I'm not saying he did or he
6 didn't, I don't remember seeing or hearing him talking to
7 anybody.

8 Q. After you called in the shots of a dog code, 1081
9 and a 1040 as you believe you did, where did you go?

10 A. I didn't go anywhere.

11 Q. Did you come back onto the property?

12 A. Yeah, I stayed in the area, you know, in and
13 around the front yard.

14 Q. Within the property line, though?

15 A. Yes.

16 Q. Not on the sidewalk?

17 A. Yeah, within the property line. At that point it
18 was a crime scene so our goal was to preserve, you know,
19 that scene.

20 Q. And why would you say it was a crime scene?

21 A. Any incident involving officers using
22 their weapons for any sort would be considered a crime
23 scene.

24 Q. Were you present at all when a discussion was
25 had about what to do with the dog?

EXHIBIT SJ-4

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A.	*
as guardian for K.H., a minor child	*
Plaintiffs	* CIVIL ACTION NO.
	* 3:08CV01644 (RNC)
vs.	*
	*
JOHNMICHAEL O'HARE,	*
ANTHONY PIA and	* JUNE 15, 2009
CITY OF HARTFORD	*
Defendants	*
	*

DEPOSITION
OF
GABRIEL LAUREANO

Taken before Sandy K. Visentin, Registered Professional Reporter and Notary Public in and for the State of Connecticut, pursuant to the Federal Rules of Civil Procedure, at the Law Offices of Jon L. Schoenhorn & Associates, LLC, 108 Oak Street, Hartford, Connecticut, on Monday, June 15, 2009, commencing at 3:30 p.m.

Sandy K. Visentin, LSR, RPR

CT Lic. #SHR.234
Andrews Reporting Service
330 Cook Hill Road
Cheshire, CT 06410
(203) 271-2190

2

1 A P P E A R A N C E S

2

3

4 REPRESENTING THE PLAINTIFF:

5 JON L. SCHOENHORN & ASSOCIATES, LLC
108 Oak Street
6 Hartford, CT 06106
By: Jon L. Schoenhorn, Esq.

7

8

9

10 REPRESENTING THE DEFENDANT:

11 HOWD & LUDORF, LLC
65 Wethersfield Avenue
12 Hartford, CT 06114-1190
By: Thomas R. Gerarde, Esq.

6

1 GABRIEL LAUREANO,

2 Deponent, after first having been duly sworn

3 by the Court Reporter, testified as follows:

1 you don't understand what I'm asking, you have the right to
2 ask -- to tell me why you don't understand my question and
3 then I can rephrase it for you. Okay?

4 A. I understand.

5 Q. Let's just talk about your career. How old are
6 you?

7 A. I'm 28 years old.

8 Q. And you made sergeant, congratulations.

9 A. Thank you.

10 Q. How long have you been with the Hartford Police
11 Department?

12 A. I have been since March 24th of 2003. That was my
13 first day at the academy.

14 Q. What is your educational background?

15 A. I completed high school.

16 Q. Where did you go to high school?

17 A. East Hartford High School. And then I did one
18 year of technical school where I studied automotive at
19 New England Technical Institute.

20 Q. Anything before the Police Academy --

21 A. No.

22 Q. -- besides that that you just told us?

23 A. That's it.

24 Q. And you became a police officer when?

25 A. March 2003 I started the Police Academy.

1 A. As far as I remember, that's how it happened, I
2 think, yes.

3 Q. It wasn't Officer O'Hare who suggested changes, is
4 it?

5 A. No.

6 Q. When you saw Mr. Hemingway on the street loitering
7 and you said something to him, what did he do?

8 A. As far as I remember, he started to walk away and
9 we started driving away. I don't remember.

10 Q. Did you observe Mr. Hemingway with any narcotics
11 in his possession on that day, December 20th, 2006?

12 A. From what I remember, I think he tried to be
13 discreet and throw it down as he was walking away.

14 Q. Well, is that something you saw or Officer O'Hare
15 saw?

16 A. I remember seeing it, I don't remember what John
17 saw or what he said he saw. But I remember seeing it.

18 Q. Seeing him doing what?

19 A. Kind of nonchalantly throw something down.

20 Q. And who got out of the patrol car as you were
21 driving away?

22 A. I don't remember.

23 Q. Well, who went over to see what he dropped?

24 A. I don't remember but I'm sure we probably all did.
25 I don't remember who.

1 Q. And when you say all, I mean, I know there was you
2 and there was Officer O'Hare?

3 A. Yes.

4 Q. Was there anybody else there at the time?

5 A. Well, you mentioned earlier that Pia was with
6 us.

7 Q. Well, I don't know if he was with you. At some
8 point he was driving unit 232. I'm trying to get the
9 sequence of when maybe somebody showed up or who was present
10 when things were going on?

11 A. I don't remember Pia, so I remember being with
12 O'Hare and going over to where George was standing.

13 Q. And you picked up what had been dropped on the
14 ground?

15 A. I don't remember who did but, yeah, somebody
16 picked it up.

17 Q. Were they plastic bags that you saw, baggies?

18 A. I have to review it. It was, yes, some heroin
19 bags.

20 Q. You just reviewed this a few days ago, right?

21 A. Yes.

22 Q. I mean, I'll show it to you but I'm trying to see
23 if you remember what's in the document that you just looked
24 at a couple of days ago?

25 A. I know. I work midnights so I'm spent actually.

1 yard of 297 Enfield Street, right?

2 A. Correct.

3 Q. And Mr. Hemingway also told you that he would not
4 say how he knew about the firearms, correct?

5 A. Correct.

6 Q. And it says here that you relayed the information
7 to officers O'Hare and Pia, do you see that, as part of the
8 next sentence?

9 A. Yes.

10 Q. All right. My question is, were officers O'Hare
11 and Pia present when Mr. Hemingway made these statements to
12 you or were you standing somewhere away from them so that's
13 why you had to relay the information to them?

14 A. As far as I remember, I think only one of us was
15 talking to them and the other two were kind of -- so I had
16 to then tell them what he was telling me.

17 Q. Okay. So you were off to the side or were you in
18 the patrol car with him?

19 A. I don't remember if I was in the car with him or
20 we were outside the -- I don't remember, like, the specifics
21 of our conversation.

22 Q. In any event, you recall, however, that O'Hare and
23 Pia were outside of your immediate hearing distance?

24 A. I think so.

25 Q. What I'm trying to understand is if they were

1 standing right there, there would be no reason why you would
2 have to relay anything to them, correct, if they heard it
3 themselves?

4 A. Yeah, but I'm assuming that -- as far as I
5 remember, I think I had to still like look up to them, talk
6 to them and go back to whatever I was doing.

7 Q. That's what I'm trying to get at. I mean, you
8 used certain words in your affidavit and I'm just trying to
9 picture what's going on here. You're having this
10 conversation with Mr. Hemingway, right?

11 A. I believe, yes.

12 Q. And it's after he's arrested but you don't recall
13 whether he's in handcuffs and you don't recall whether he's
14 in the back of the car, right?

15 A. Right.

16 Q. And this is still on Garden Street, correct?

17 A. I don't know. I don't know if we had moved or if
18 we were still on Garden Street.

19 Q. Well, there's nothing in this report about going
20 to Vineland Terrace, is there?

21 A. No.

22 Q. So I'm asking why did you go to Vineland Terrace,
23 if you recall?

24 A. I don't remember. Maybe we didn't want to talk to
25 George right there because people saw us.

1 A. I don't know.

2 Q. Why didn't you say I got information from a
3 parolee?

4 A. I don't know.

5 Q. Why didn't you name the person as George Hemingway
6 in this report?

7 A. I don't know why I didn't put his name in there.

8 Q. All right. And is this the information, whether
9 you accurately identified the source or not, was the
10 information you wrote here correct that there were two
11 handguns stashed in an abandoned motor vehicle, that's
12 what Hemingway told you, right?

13 A. As far as I remember, yes.

14 Q. And is that what you repeated to Pia and O'Hare?

15 A. As far as I remember, yes.

16 Q. There was nothing about some deal going down where
17 you were going to catch the person bringing the guns to the
18 scene, correct?

19 A. I don't remember.

20 Q. Well, if there were, you would have put that down
21 in your report, wouldn't you have?

22 A. I don't remember what you just said.

23 Q. You don't remember what I just said?

24 A. About the catching. I'm trying to put in here
25 what I had to put in here.

66

1 investigate any potential criminal or dangerous activity
2 going on in the City of Hartford?

3 A. Yes.

4 Q. And it says here that's why you relayed this
5 information to officers Pia and O'Hare; is that correct,
6 because you felt you were hoping to keep the citizens of
7 Hartford safe?

8 A. Yes.

9 Q. Did you make any kind of deal with
10 George Hemingway that if he would turn in any handguns you
11 might not arrest him for the narcotics?

12 A. No. I'm pretty sure he was told he was still
13 going to be arrested.

14 Q. Now, the next sentence here says the
15 officers -- now, I asked you about the warrant previously
16 but here it says, "The officers responded to the location in
17 good faith." Do you see that?

18 A. Yes, I see it.

19 Q. Now, how did you know what was in either Pia or
20 O'Hare's mind when they went to Enfield Street?

21 MR. GERARDE: Other than what he told them
22 you mean? I don't understand that question.

23 BY MR. SCHOENHORN:

24 Q. How do you know what kind of faith they were
25 acting under?

EXHIBIT SJ-5



EXHIBIT SJ-6



EXHIBIT SJ-7



EXHIBIT SJ-8



EXHIBIT SJ-9

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A.	:	CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	AUGUST 3, 2009

AFFIDAVIT OF GLEN HARRIS

I, Glen Harris, being duly sworn according to law, hereby depose and state as follows:

1. I am over the age of eighteen and understand the obligations of an oath.
2. While my family and I resided at 297 Enfield Street in Hartford, Connecticut, we used the rear yard in the following ways:
 - A. In the warmer months we would cook outside in the rear yard.
 - B. We socialized with friends and family in the rear yard. Occasionally a few of my coworkers would stop by after work and we would have a beer outside.
 - C. I played ball with my two dogs, Deuce and Seven, while Seven was still alive.
 - D. I maintained the yard by cutting the grass and taking out the weeds so that the yard would look good and my family would want to use it.
 - E. I washed and maintained my car in the rear yard of 297 Enfield Street.
3. My dogs were good-tempered, obedient, playful dogs. They did not bite anyone and listened to me when I gave them commands.

I have reviewed the forgoing affidavit and swear, under penalties of perjury, that is true
and correct to the best of knowledge and belief.

Dated this 7TH day of AUGUST, 2009 at Hartford, Connecticut.


Glen Harris

Subscribed and sworn to before me on this 7th day of AUGUST, 2009.

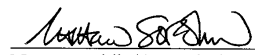

Notary Public/Commissioner of the Superior Court
JULIS NO. 425-795

EXHIBIT SJ-10

ARREST WARRANT APPLICATION

JD-CR-64E Rev. 10-04
 C. S. 54-2a
 Pr. Bk. Sec. 36-1, 36-2, 36-3

STATE OF CONNECTICUT
 SUPERIOR COURT
 www.jud.state.ct.us

FOR COURT USE ONLY	
SUPPORTING AFFIDAVITS SEALED	
<input type="checkbox"/> YES	<input type="checkbox"/> NO

AGENCY NAME Hartford Police Department		AGENCY NO. 06-54796
NAME AND RESIDENCE (Town) OF ACCUSED [REDACTED]	COURT TO BE HELD AT (Town) Hartford	G.A. NO. 14

APPLICATION FOR ARREST WARRANT

TO: A Judge of the Superior Court

The undersigned hereby applies for a warrant for the arrest of the above-named accused on the basis of the facts set forth in the: ☒ AFFIDAVIT BELOW. ☐ AFFIDAVIT(S) ATTACHED.

DATE AND SIGNATURE	DATE	SIGNED (Prosecuting Authority)	TYPE/PRINT NAME OF PROSECUTING AUTHORITY
--------------------	------	--------------------------------	--

AFFIDAVIT

The undersigned affiant, being duly sworn, deposes and says:

The Affiants are sworn members of the Hartford Police Department, currently assigned to the North east Conditions Unit. We have a combined Police Experience of six and half years. During this time we have been trained to investigate and have investigated many cases such as the incident listed below.

On 12/20/06 The affiants were dressed in full Police uniform and operating a fully marked Police vehicle. At 1500 hours the affiants were traveling south on Garden Street on proactive patrol. In front of 717 Garden Street the affiants saw a male that we recognized as [REDACTED] from numerous previous encounters standing on the side walk aimlessly pacing back and forth. [REDACTED] has been identified by the Hartford Police Department as a ranking member of a violent City gang called "Wes Hell". We saw [REDACTED] obstructing and hindering pedestrian traffic. 717 Garden Street is a multi residential occupied dwelling. The front of the property is marked with signs indicating that loitering and trespassing are not tolerated. There is an active standing complaint on file with the Hartford Police Department under case number 06- 440. I have personally been present when [REDACTED] has been told by Hartford Police Officers not to loiter in the area of 717 Garden Street.

We stopped our cruiser directly in front of [REDACTED]. From the vehicle we informed [REDACTED] to move from the sidewalk. As we drove away [REDACTED] proceeded to walk away south on Garden Street. From his right hand I saw [REDACTED] drop to the sidewalk several clear plastic bags. From training and experience I am aware that contraband is often concealed in plastic bags for sale and transportation. I exited our vehicle and recovered eight clear double heat sealed bags each containing a white folded wax paper each stamped "Black Jack" in green. Each bag contained a white powder substance.

(This is page 1 of a 3 page Affidavit.)

DATE AND SIGNATURE	DATE 12/20/06	SIGNED (Affiant) Gabriel Laureano
JURAT	SUBSCRIBED AND SWORN TO BEFORE ME ON (Date) 12/20/06	SIGNED (Judge / Clerk / Comm / Sup. Ct. / Notary Public) [Signature]

FINDING

The foregoing Application for an arrest warrant, and affidavit(s) attached to said Application, having been submitted to and considered by the undersigned, the undersigned finds from said affidavit(s) that there is probable cause to believe that an offense has been committed and that the accused committed it and, therefore, that probable cause exists for the issuance of a warrant for the arrest of the above-named accused.

SIGNATURE	SIGNED AT (City or Town)	ON (Date)	SIGNED (Judge / Judge Trial Referee)	NAME OF JUDGE/JUDGE TRIAL REFEREE
-----------	--------------------------	-----------	--------------------------------------	-----------------------------------

ARREST WARRANT AFFIDAVIT

CONTINUATION PAGE

JD-CR-64a Rev 10-04

C.G.S. § 54-2a

Pr Bk Sec 36-1, 36-2, 36-3

INSTRUCTIONS:

The jurat is to be completed for each page of the affidavit.

The prosecutorial official and judge/judge trial referee are to date and sign or initial each page to indicate that they have reviewed it.

STATE OF CONNECTICUT
SUPERIOR COURT

NAME AND RESIDENCE (Town) OF ACCUSED

COURT TO BE HELD AT (Town)

Hartford

G.A. NO.

14

AFFIDAVIT

The undersigned affiant, being duly sworn, deposes and says:

I immediately recognized the items as being packaged heroin ready for street level sale. I quickly ran up to [REDACTED] and due to the fact that [REDACTED] is known to carry firearms, since he is on parole for a firearm charge I detained him. The white powder substance was later field tested via NIK revealing a positive reaction for Heroin.

As I escorted [REDACTED] to our vehicle, with out any threat, promise or coercion [REDACTED] informed me that he knew where two firearms were stashed. I never promised [REDACTED] anything. I informed [REDACTED] that he would still have to be arrested. I informed [REDACTED] that I could make contact with the prosecutor and mention his effort to aid us in recovering two firearms. [REDACTED] acknowledged that he understood and still furnished me with the information.

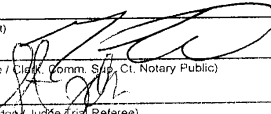
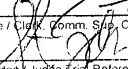
[REDACTED] informed me that there were two small caliber firearms under the drivers seat of an abandoned Nissan Maxima in the rear yard of 297 Enfield Street. [REDACTED] would not say how he knew about the firearms. Having a duty to protect the citizens of Hartford, knowing that the area around Enfield Street has been plagued by numerous shooting incidents, I relayed the information to Officer's O'Hare and Pia. The mentioned Officers responded to 297 Enfield Street in good faith hoping to rid the City of two illicit firearms.

Upon arriving at 297 Enfield Street. Officer's Ohare and Pia encountered a large dog. The dog chased the Officers. Being unable to retreat to safety Officer O'Hare fired his service weapon at the dog. From my location I heard the shots fired. Officer Pia broadcasted over his Police radio that shots were fired and that they needed assistance. It was unclear if an Officer was down. Concerned for the safety of my fellow Officers, fearing that one of them may been wounded in a possible ambush and needed help, I left [REDACTED] on the sidewalk and responded to 297 Enfield Street. See Officer O'Hare's supplement under HPD case number 06-54779. No firearms were recovered. No abandoned cars were found in the vicinity of 297 Enfield Street.

After the scene was secured, I returned to 717 Garden Street and canvassed for [REDACTED], with negative results in locating him. I tagged the eight double heat sealed bags each containing a white folded wax paper each stamped "Black Jack" in green ink each containing a white powder substance and turned them into the HPD property room as evidence under property receipt number AA 73478.

Based on the listed facts and circumstances I believe that probable cause exists and ask that a warrant be issued for [REDACTED] charging him with Possession of Narcotics, 21a-279(a),

(This is page 2 of a 3 page Affidavit)

DATE AND SIGNATURE	DATE 12/20/06	SIGNED (Affiant) 
JURAT	SUBSCRIBED AND SWORN TO BEFORE ME ON (Date) 11/20/06	SIGNED (Judge / Clerk, Comm. Sup. Ct. Notary Public) 
REVIEWED (Prosecutorial Official)	DATE	REVIEWED (Judge / Judge Trial Referee)
		DATE

ARREST WARRANT AFFIDAVIT

INSTRUCTIONS:

STATE OF CONNECTICUT
SUPERIOR COURT

CONTINUATION PAGE

JD-CR-64a Rev. 10-04
C.G.S. § 54-2a
Pr. Bk. Sec. 36-1, 36-2, 36-3*The jurat is to be completed for each page of the affidavit.
The prosecutorial official and judge/judge trial referee are to date
and sign or initial each page to indicate that they have reviewed it.*

NAME AND RESIDENCE (Town) OF ACCUSED [REDACTED]	COURT TO BE HELD AT (Town) Hartford	G.A. NO. 14
--	--	----------------

AFFIDAVIT

The undersigned affiant, being duly sworn, deposes and says:

Possession of Narcotics With Intent to sell, 21a-278(b), and Possession With Intent to Sell Within 1500 feet of a School, 21a-278(a)(b).

Utilizing the HPD in house computer it was determined that the location of incident was within 1500 feet of the Waverly School, located at 85 Waverly Street.

(This is page 3 of a 3 page Affidavit)

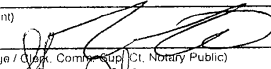
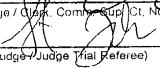
DATE AND SIGNATURE	DATE 12/20/06	SIGNED (Affiant) 
JURAT	SUBSCRIBED AND SWORN TO BEFORE ME ON (Date) 12-20-06	SIGNED (Judge / Clerk, Comm. Sup. Ct., Notary Public) 
REVIEWED (Prosecutorial Official)	DATE	REVIEWED (Judge / Judge Trial Referee) DATE

EXHIBIT SJ-11

SUPPLEMENT 1 JUVENILE REFERRAL										INCIDENT SUPPLEMENT										CASE # 06-54779																			
DATE OF INCIDENT 12/2/06										TIME OF INCIDENT 1522										DATE REPORTED 12/20/06										LOCATION 297 Enfield Street Hartford									
STATE CODE 06										COUNTY CODE 06										INCIDENT 297 Enfield Street Hartford										HPT									
SUSPECT CODE A - ABANDONED E - EVIDENCE F - FOUND L - LOST R - RECOVERED S - STOLEN T - TOWED V - VEHICLE O - OTHER D - DAMAGED W - SUSPECT VEHICLE										WITNESS CODE A - ALIAS O - OTHER L - LOCATED B - BUSINESS R - REFERRED JUVENILE P - PERUSIAN K - OWNER of MV N - PASSENGER M - MV T - TICKETED Z - OPERATOR MAY										FIRST NAME LAST NAME										DATE OF BIRTH AGE ADDRESS									
STATUTE CHARGE 1										STATUTE CHARGE 2										STATUTE CHARGE 3										STATUTE									
SEX RACE AGE HEIGHT WEIGHT										HAIR COLOR EYES COLOR										COMPLEXTION										DESCRIPTION/COMMENTS/DISTINCTIVE FEATURES									
PROPERTY CODE A - ABANDONED E - EVIDENCE F - FOUND L - LOST R - RECOVERED S - STOLEN T - TOWED V - VEHICLE O - OTHER D - DAMAGED W - SUSPECT VEHICLE										ITEM YEAR										STATE REGISTRATION										COLOR SERIAL OR VIN									
O 1 Related Case Number																				06-54796																			
DETAILS																																							

I am currently assigned to the Northeast Conditions Unit (NECU). This is a proactive street unit that is tasked to address all quality of life issues. These issues include but are not limited to; Weapon violations, street level drug sales, motor vehicle violations, loitering, and criminal trespassing. On 12/20/06 I was dressed in full uniform and operating a marked Hartford Police cruiser as unit #231. At 1522 hours Officer Pia (G99) and I responded to 297 Enfield Street, in marked Hartford Police cruiser #232, to investigate some information we received (see related case #06-54796) that there were two (2) handguns stashed inside an abandoned vehicle located in the rear of 297 Enfield Street. Officer Pia and I parked our Marked Cruiser in front of 305 Enfield Street and approached 297 Enfield Street on foot. There was a partial fence in front of the house located at 297 Enfield Street but there was no gate in front of the driveway or front walkway. The access to the front yard was unrestricted at these access points.

I walked in front of Officer Pia and we entered the front yard through the front walkway. We approached the rear of the yard through a narrow passage on the north side of the residence. As we reached the back yard I saw a large brown and white dog in the southwest corner of the yard. The dog appeared to be coming through a hole in the wooden fence and was approximately twenty (20) yards away from myself and Officer Pia. I did not see or hear any parties in the back yard with the dog and the dog was unfleashed. The large brown and white dog looked at Officer Pia and I and then stopped momentarily. The large brown and white dog then loudly growled, showing its teeth, and began to run towards Officer Pia and I. I was standing in front of Officer Pia and loudly yelled "Run!". We both turned our backs to the large dog and began to run east, along the north passageway, towards the front of the house. I looked over my shoulder as we ran to the front of the house and saw that the large dog was approximately 10 feet behind me. The large dog was still running towards my direction and was snapping its teeth in an aggressive manner. I yelled to Officer Pia to "Hit the fence!" instructing him to jump over a chain link fence partially enclosed the front yard. I was still several feet behind Officer Pia and was unable to find an alternate avenue of escape as the large Dog continued to charge in my direction.

DATE OF SUPPLEMENT 12/21/06		INVESTIGATING OFFICER Johnmichael O'Hare		CODE G99-05		ASSISTING OFFICER		CODE	
DISTRIBUTION: <input type="checkbox"/> MAJOR CRIMES <input type="checkbox"/> GUN TASK FORCE <input type="checkbox"/> JID <input type="checkbox"/> DISTRICT/ZONE CO		<input type="checkbox"/> NARCOTICS <input type="checkbox"/> INTELLIGENCE <input type="checkbox"/> OTHER				SUPERVISOR REVIEW		CODE	
<input type="checkbox"/> Records <input type="checkbox"/> States Attorney <input type="checkbox"/> Investigative <input checked="" type="checkbox"/> Officer		PAGE 1 OF 2 PAGES		AFFIDAVIT STATEMENT: (initials only)		SUPERVISOR (signature)		CODE	
HPT ORN # 77 REV 05/06									

EXHIBIT SJ-12



EXHIBIT SJ-14

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and PPA as	:	
Guardian for K.H., a minor child,	:	
Plaintiffs,	:	Civil Action No.
	:	
vs.	:	3:08CV01644-RNC
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA,	:	
AND CITY OF HARTFORD,	:	MAY 6, 2009
Defendants.	:	
	:	

DEPOSITION OF K.H.

APPEARANCES:

JON L. SCHOENHORN & ASSOCIATES, LLC

Attorneys for the Plaintiffs

108 Oak Street

Hartford, Connecticut 06106-1514

(860) 278-3500

BY: JON L. SCHOENHORN, ESQUIRE

SARA PACKMAN, ESQUIRE

HOWD & LUDORF, LLC

Attorneys for the Defendant

65 Wethersfield Avenue

Hartford, Connecticut 06114-1190

(860) 249-1361

BY: THOMAS R. GERARDE, ESQUIRE

OFFICE OF THE CORPORATION COUNSEL

Attorneys for the City of Hartford

550 Main Street

Hartford, Connecticut 06103

(860) 757-9700

BY: NATHALIE FEOLA-GUERRIERI, ESQUIRE

Assistant Corporation Counsel

ALSO PRESENT: GLEN HARRIS, Plaintiff

NICOLE M. GOSSELIN, R.P.R.

. . . Deposition of K.H., taken on behalf of

the Defendants in the hereinbefore entitled action,

pursuant to the Federal Rules of Civil Procedure, before

Nicole M. Gosselin, R.P.R., duly qualified Notary Public in

and for the state of Connecticut, held at the law offices

of Howd & Ludorf, LLC, 65 Wethersfield Avenue, Hartford,

Connecticut, commencing at 1:34 p.m., on Wednesday, May 6,

2009 . . .

K . H . ,

of 213 Barbour Street, Hartford, Connecticut,

being first duly sworn by Nicole M. Gosselin, R.P.R.,

a Notary Public within and for the state of

Connecticut, was examined, and testified on her

oath as follows:

15

don't know, I could have stopped it somehow, and I should have.

Q You heard your dad say that, well, your dad testified as to how you reported what happened to him, and one of the things he said was that you were out in the backyard with Seven before Seven then bolted around to the front?

A Yes.

Q Is that true?

A Yes.

Q Okay. And is the reason why you were out in the backyard because you were -- Well, why don't you just tell me what were you and Seven doing in the backyard?

A I brought him outside to use the bathroom because we were going to play outside.

Q So you took Seven out in the backyard after you got home from school?

A Yes.

Q And that would be the time when Seven could go to the bathroom?

A Yes.

Q And then you could hang out with him and play with him?

A Yes.

It's not only him, though. It was Deuce, too.

29

I saw the police officer, so...

Q Okay. When the shots were fired, in terms of hearing them, you were on the side of the Dumpster opposite the side we see in photograph 1-E, and almost finished running alongside it and reaching your father's car?

A Yes.

Q And then you say you stopped?

A Yes. Because I heard the gunshots. So I didn't, like kind of didn't know what to do. I was kind of lost.

Q Okay. Let me ask you, did you know that those were gunshots when you heard those noises or were they just startling loud noises?

A They were just startling really close. And I heard the cars beeping horns, and I was like, Did my dog get hit and whatnot? So I was kind of confused.

And when I stopped, I saw a police officer, and I said, "Don't shoot my dog," because I saw my dog on the ground.

And he looked at me and he shot him. Well, he didn't go to him and shoot him, but he still shot him.

I said, "Don't shoot my dog." He looked at me, leaned over, and he shot him in the head. Again. For no reason.

Q Do you know whether or not Seven was hit with

30

either of the first two shots?

A No, I just know he was on the ground. So I'm figuring he did get hit.

Q Do you know if Seven was moving still when the third shot was fired?

A His tail was wagging.

Q His tail was wagging?

A He was still breathing.

Q You think he was still breathing?

A He was still breathing.

Q Did you see anything that was happening with his face, whether his mouth was open or shut?

A His mouth was open. His tongue was hanging out. He was breathing hard when I ran to him.

Q Okay. Now, does one of these photographs show where you were when the third shot was fired? Let's get the one that showed the front yard.

Why don't we try G?

MR. SCHOENHORN: Or F maybe?

MR. GERARDE: Or F, okay.

BY MR. GERARDE:

Q Here's F and here's G.

A I was standing right there. And the police officer was right there in the grass.

Q Okay. I have to try and describe for the record

32

the left front corner, correct?

A Okay.

Q Okay. And then the police officer, you say, was in the grass, and you pointed to the photograph somewhere?

A He was right here. (Indicating).

Q On pavement or on the grass?

A He was on the grass.

Q Okay. And you pointed to a spot on that photograph basically just to the right of where this piece of fence juts out but on the grass.

A He was like right there, so close together -- in the picture I had, it's kind of hard to tell. There's space between it.

Q I see.

A Here you go. In 1-G, he was standing a little bit right there, at the end in the grass.

Q So if you look at the lower right-hand corner of the photograph and you move up a little bit, maybe a half an inch or so on the photograph, in that part of the grass?

A Yes.

Q Did you see any police officer on your property at any time before you came around the Dumpster and around your father's car?

A Before that?

Q Yes.

35

Q So after the third shot was fired, did you run over?

A Yes.

Q And then what did you do?

A I was on Seven.

Q Okay. Did you --

A He started to talk to me. First he said, "Sorry, Miss, but your dog's not going to make it." And then that's what ticked me off.

Q Okay. And are you saying you don't remember exactly what you said to him, but you just remember like --

A It was more "Why did you shoot my dog?" constantly over and over. And probably a few swear words in that process. But, yes.

Q Okay. So you were obviously expressing that you were upset over the fact that your dog had been shot?

A That would be, yes.

Q Did the police say anything to you other than what you've told me?

A No.

Q Well, how long were you by Seven's side on the ground before you went somewhere else?

A Before I got up and left?

Q Yes.

A I didn't want to -- That was after my stepmom

38

A Because I -- By the time I got to the driveway, if I would have said "Stop," he would have stopped. No matter what, he would have stopped.

Q Seven would have stopped?

A Seven would have stopped. He knows he is not supposed to be out of the yard, so he never leaves the yard.

Q But you realize he was shot before he left the yard; he was shot on the property?

A Yes, I realize that.

Q And he had been shot twice before you even saw him to say "Stop"?

MR. SCHOENHORN: Object to the form.

Q Is that right, or the gun, the gun had been fired twice before you even got there; am I right about that?

A Yes.

Q As you sit here today, I'm going back to school now, do you think there is something you want to be in life? You know, I want to grow up and be a whatever?

A My career goal?

Q Yes.

A An oncologist.

Q Say that again?

A Oncologist.

EXHIBIT SJ-15

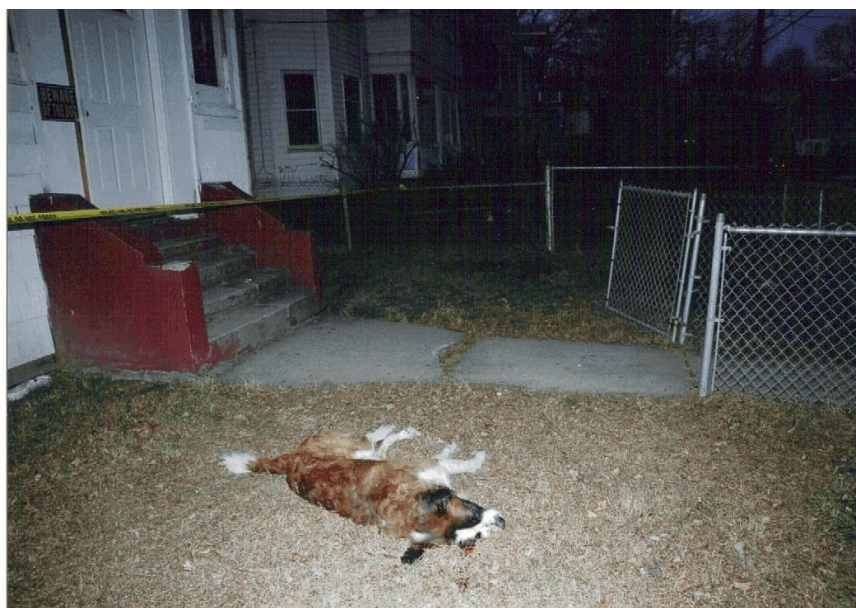


EXHIBIT SJ-16

PROSECUTOR REPORT (Comm. Code <input type="checkbox"/>) <input checked="" type="checkbox"/> SUPPLEMENT <input type="checkbox"/> JUVENILE REFERRAL														
DATE OF INCIDENT 12/20/06					TIME OF INCIDENT 1:32					DATE REPORTED 12/20/06				
HARTFORD POLICE DEPARTMENT INCIDENT SUPPLEMENT														
STATUS CODE: A - ACCUSED C - COMPLAINT J - JUVENILE S - SUSPECT M - MISSING V - VICTIM W - WITNESS I - INTERVIEWED X - ALIAS O - OTHER L - LOCATED B - BUSINESS R - REFERRED JUVENILE P - PESTERHAUL K - OWNER of ANY N - PASSENGER in ANY T - TOWED Z - OPERATOR in ANY										INCIDENT LOCATION 297 Enfield Street Hartford CT				
B. STATUS LAST NAME FIRST NAME MI. SEX RACE DATE OF BIRTH AGE ADDRESS APT./FLOOR TELEPHONE														
ARREST CHARGE 1 STATUTE CHARGE 2 STATUTE CHARGE 3 STATUTE														
SUSPECT SEX RACE AGE HEIGHT WEIGHT LESS HAIR COLOR HAIR TYPE COMPLEXION DESCRIPTION/COMMENTS/DISTINGUISHING FEATURES														
PROPERTY CODE: A - ABANDONED E - EVIDENCE F - FOUND L - LOST R - RECOVERED S - STOLEN T - TOWED V - VEHICLE O - OTHER D - DAMAGED W - SUSPECT VEHICLE CODE QTY. YEAR ITEM BRAND/MODEL STATE REGISTRATION COLOR SERIAL OR VIN. CHARGES/STATUTES/CONDITION CLASS														
DETAILS \$ \$														

EXHIBIT SJ-17

VIA CERTIFIED MAIL

TO: Town and City Clerk, City of Hartford
550 Main Street, #104
Hartford, CT 06103

NOTICE IS HEREBY GIVEN that GLEN HARRIS, on behalf of Minor KAYAHRA HARRIS, of 279 Enfield Avenue, Hartford, CT, intends to bring an action pursuant to Connecticut General Statutes, Sections 7-101a and 7-465, against the Town of Hartford and Officer Johnmichael O'Hare, Officer Pia and Detective Gabriel Laureano of the Hartford Police Department. The particulars are as follows:

TIME AND DATE OF OCCURRENCE:

December 20, 2006, at approximately 1500 hrs.

PLACE OF OCCURRENCE:

279 Enfield Avenue, Hartford, Connecticut

CIRCUMSTANCES:

Glen Harris resides in a private, single-family house on 297 Enfield Avenue with his 12-year old daughter, Kayahra Harris. Mr. Harris was the owner of a St. Bernard dog named Seven. On the afternoon of December 20th, 2006, Kayahra took Seven to the backyard for some fresh air. Suddenly, without permission, authority or justification, Officers O'Hare and Pia entered the backyard, which was marked with a sign that cautioned, "Beware of Dog." When the officers entered the rear yard, the dog ran to the front of the yard and barked once. The dog was barking but posed no immediate threat to the officers. Officer O'Hare retreated from the dog's harmless advances and removed his weapon. Under no immediate threat, Officer O'Hare vindictively shot the dog twice, severely wounding it to incapacitation. Kayahra Harris ran around the corner of the house to retrieve the dog and witnessed Officer O'Hare walk up to the wounded animal as it lay on the ground and shoot the dog at a point blank range. Detective Laureano conspired with Officer Pia and Officer O'Hare by falsely reporting that an "anonymous tipster" had reported that there were guns on the property in an attempt to justify the warrantless search of Mr. Harris' property. Glen Harris' St. Bernard dog was

illegally seized and shot by Officer O'Hare, without any lawful authority or justification and in violation of his state and federal constitutional rights, and pursuant to state law.

INJURIES AND DAMAGES:

The actions of the Hartford police officers, have caused the claimant, KAYAHRA HARRIS, to suffer emotional pain and suffering.

Dated at Hartford, Connecticut this 9th day of April, 2007.

CLAIMANT, GLEN HARRIS

By 
Jon L. Schoenhorn, Esquire
Jon L. Schoenhorn & Associates
108 Oak Street
Hartford, CT 06106

USPS - Track & Confirm

<http://trkcnfrm1.smi.usps.com/PTSIInternetWeb/InterLabelInquiry.do>[Home](#) | [Help](#) | [Sign In](#)[Track & Confirm](#)[FAQs](#)

Track & Confirm

Search Results

Label/Receipt Number: **7004 1350 0003 6973 7344**
Status: **Delivered**

Your item was delivered at 11:36 am on April 10, 2007 in HARTFORD, CT 06103. A proof of delivery record may be available through your local Post Office for a fee.

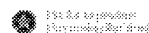
Additional information for this item is stored in files offline.

[Restore Office Details >](#)[Return to USPS.com Home >](#)[Track & Confirm](#)

Enter Label/Receipt Number.

[Go >](#)[Site Map](#)[Contact Us](#)[Forms](#)[Gov't Services](#)[Jobs](#)[Privacy Policy](#)[Terms of Use](#)[National & Premier Accounts](#)

Copyright© 1999-2007 USPS. All Rights Reserved. No FEAR Act EEO Data FOIA



Ayers

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY											
<p>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to:</p> <p><i>Town and City Clerk, City of Hfd</i> <i>550 Main Street #104</i> <i>Hartford, CT 06103</i></p>		<p>A. Signature</p> <p><i>C. PLOWMAN</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>C. PLOWMAN</i> C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>											
<p>2. Article Number (Transfer from) 7004 1350 0003 6973 7344</p>		<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No</p>											
<p>Form 3811, August 2001 Domestic Return Receipt</p>		<p>Postage & Fees</p> <table border="1"> <tr> <td>Postage</td> <td>\$.39</td> </tr> <tr> <td>Certified Fee</td> <td>2.40</td> </tr> <tr> <td>Return Receipt Fee (if required)</td> <td>1.85</td> </tr> <tr> <td>Restricted Delivery Fee (if required)</td> <td></td> </tr> <tr> <td>Total</td> <td>\$4.64</td> </tr> </table>		Postage	\$.39	Certified Fee	2.40	Return Receipt Fee (if required)	1.85	Restricted Delivery Fee (if required)		Total	\$4.64
Postage	\$.39												
Certified Fee	2.40												
Return Receipt Fee (if required)	1.85												
Restricted Delivery Fee (if required)													
Total	\$4.64												

Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For more information visit our website at www.usps.com

OFFICIAL USE

Postmark Here

PS Form 3800, June 2002 See Reverse for Instructions

City Clerk - City of Hfd
Street, Apt. No., or PO Box No. *550 Main St. #104*
City, State, ZIP+4 *Hfd, CT 06103*

particular, whether O'Hare deliberately and sadistically walked up to the wounded dog as it lay on its side and shot it in the head, as K.H. looked on and screamed in horror.

II. STATEMENT OF FACTS

The following facts are taken from sworn depositions, affidavits and police reports: On December 20, 2006, the plaintiff owned and resided in a house located at 297 Enfield Street in Hartford, with his twelve-year-old daughter, K.H. and his girlfriend, Tashonna Ayers. Glen Harris Dep., Ex. SJ-1, at pp.11-12. No one else resided at 297 Enfield Street. Approximately three years earlier, the plaintiff purchased two St. Bernard puppies, which he named Deuce and Seven, as family pets. *Id.*, at 13.

The yard surrounding 297 Enfield Street was almost completely fenced in, and the plaintiff routinely let the dogs out into the back yard without leashes, confident that the dogs would stay in the yard. *Id.*, at 24-25, 131-132; Picture of Rear Yard at 297 Enfield Street, Ex. SJ-6; Satellite Picture of 297 Enfield Street, Ex. SJ-7; O'Hare Dep., Ex. SJ-2, at 60, 82. The only gap in the fence was across the driveway. In addition, there was a chain-link gate across the front walkway that led from the public sidewalk to the front door. Glen Harris Dep., Ex. SJ-1, at 25; O'Hare Dep., Ex. SJ-2, at 66-67. Along one side of the yard stood a wooden stockade fence. Although a few panels of the wooden fence had been displaced by a fallen tree, there existed a chainlink fence immediately behind the wooden fence, and the wood panels were propped against the metal chainlink fence. Together, these fences formed a continuous barrier along the border of the side and rear yards. Glen Harris Dep., at 28-29, 33-34, 43; Picture of Rear Yard at 297 Enfield Street, Ex. SJ-6. A wooden fence and the rear wall of a garage formed a solid barrier along the northwest border in the rear of the property, and a chainlink fence ran along the north east border.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Ex. SJ-1, at 24; Ex. SJ-6; Ex. SJ-7; Ex. SJ-8. In addition, “Beware of the Dog” signs were posted at the time on three sides of the house. Glen Harris Dep., at 46-47. The plaintiffs used their yard to play outside with their dogs, hold cookouts, and entertain friends, family, and coworkers. Glen Harris Aff., Ex. SJ-9.

On December 20, 2006, Defendants O’Hare and Pia, and Gabriel Laureano (“Laureano”), were employed as officers with the City of Hartford Police Department. O’Hare Dep., Ex. SJ-2 at 10; Pia Dep., Ex. SJ-3, at 6. On that date, O’Hare was driving a marked police vehicle with Laureano in Hartford when Laureano noticed a person he recognized as George Hemingway loitering in front of 717 Garden Street. Laureano Dep., Ex. SJ-4, at 9, 26-27; O’Hare Dep., Ex. SJ-2, at 20-21. Mr. Hemingway began to walk away on Garden Street, and as he did so, Laureano noticed Mr. Hemingway drop several plastic bags, which O’Hare determined contained heroin. O’Hare Dep., Ex. SJ-2, at 24. Laureano or O’Hare ordered Mr. Hemingway to stop walking away and he complied. O’Hare Dep., Ex. SJ-2, at 25.

Laureano questioned Hemingway during the course of which Hemingway provided information to the effect that there were two firearms located in an abandoned Nissan Maxima in the back yard of 297 Enfield Street. Laureano Dep., Ex. SJ-4, at 35-36; Hemingway Arrest Warrant Affidavit, Ex SJ-10. Hemingway did not indicate to Laureano how he learned about the existence of the firearms. Laureano Dep., Ex. SJ-4, at 35-36; Arrest Warrant Affidavit, Ex SJ-10. Neither O’Hare nor Pia heard the conversation between Laureano and Mr. Hemingway, but Laureano later relayed the information to O’Hare and Pia. O’Hare Dep., Ex. SJ-2, at 27; Laureano Dep., Ex. SJ-4, at 35, 62; Pia Dep., Ex. SJ-3, at 30, 32. O’Hare’s Incident Supplement for Case 06-54779, Ex. SJ-11; Pia’s Incident Supplement for Case 06-54779. Ex. SJ-12. Neither

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

O'Hare nor Pia considered Mr. Hemingway to be a reliable informant, and both officers knew that Mr. Hemingway was a convicted felon. O'Hare Dep, Ex. SJ-2, at 22-23; Pia Dep., Ex. SJ-3, at 25-26.¹

O'Hare and Pia responded to 297 Enfield Street to investigate the presence of an abandoned car and firearms at that location based solely upon the information conveyed by Laureano. O'Hare Dep, Ex. SJ-2, at 27, 47-48; Pia Dep., Ex. SJ-3, at 30, 32, 39; O'Hare's Incident Supplement for Case 06-54779, Ex. SJ-11; Pia's Incident Supplement for Case 06-54779, Ex. SJ-12. The defendants were unable to see the plaintiffs' backyard from the street or sidewalk, and were unable to determine from a public vantage point, if any abandoned cars or firearms existed. O'Hare Dep., Ex. SJ-2, at 51-52. Even though O'Hare and Pia did not have a warrant to search the property at 297 Enfield Street, they entered the property and moved across the front yard to the north side of the house with their guns drawn. O'Hare Dep., Ex. SJ-2, at 48-49, 50-51, 54; Pia Dep., Ex. SJ-3, at 33-34, 42, 44, 58; Diagram of Officer's Path on the Property, Ex. SJ-13.

On the afternoon of December 20, 2006, K.H. had just returned home from school and brought Deuce and Seven one at a time into her backyard. Glen Harris Dep., 59-60; K. H. Dep., Ex. SJ-14, at 15. When the defendants entered the yard at approximately 3:22 p.m., K. H. was standing in the back yard with Seven. Glen Harris Dep, 59-60; K. H. Dep., Ex. SJ-14, at 15. As the defendants rounded the rear corner of the house, they gained a partial view of the back yard

¹

Although the plaintiffs dispute most of the facts contained in paragraphs 13-20 of their Local Rule 56(a)(1) statement, they necessarily adopt the defendants' version of events as contained in their reports and depositions for purposes of this summary judgment motion.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

and spotted one of the dogs in the corner of the yard. O'Hare Dep., Ex. SJ-2, at 55; Pia Dep., Ex. SJ-3 at 52. As the dog began to move toward the defendants, the defendants ran toward the front yard along the north side of the house. O'Hare Dep., Ex. SJ-2, at 63-66; Pia Dep., Ex. SJ-3 at 56-57, 59. Pia ran across the front yard, onto the driveway, and around the chainlink fence surrounding the front yard. Once outside the property, he turned back to see O'Hare standing in the middle of the front yard, telling the dog to stop as it approached him. O'Hare then shot the dog.² O'Hare Dep., Ex. SJ-2, at 63-66; Pia Dep., Ex. SJ-3 at 56-57, 59; K.H. Dep., Ex. SJ-14, at 32, 38. Pia observed K.H. screaming and crying. Pia Dep., SJ-3, at 64-65. Seven died of the gunshot wounds inflicted by O'Hare that afternoon. Glen Harris Dep., Ex. SJ-1, at 66.

III. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When deciding a motion for summary judgment, the court "must resolve all ambiguities and draw all inferences in favor of the nonmoving party." *Millgard Corp. v. White Oak Corp.*, 224 F. Supp. 2d 425, 428, (D. Conn. 2002), *citing Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992).

The moving party bears the initial burden of demonstrating that no factual issue exists and

²

The minor plaintiff, K.H., testified at her deposition that, after hearing two shots fired, she observed O'Hare standing over Seven, who had fallen to the ground but was still alive and breathing heavily. K.H. further testified that she saw Seven weakly wagging his tail as O'Hare aimed a pistol at Seven's head. K.H. screamed "Don't shoot my dog," and O'Hare looked toward K.H., then looked back toward Seven, and executed the family pet. Compl. ¶ 14; K.H. Dep, Ex. SJ-14, at 29-30, 35. The defendants dispute these facts.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). In ruling on a motion for summary judgment,

[t]he inquiry performed is the threshold inquiry of determining whether there is a need for a trial - whether, in other words, there are any factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). *See also, Wright v. Goord*, 554 F.3d 255, 266 (2d. Cir. 2009).

The movant must demonstrate the absence of a genuine issue of material fact. If the movant carries this burden, the burden then shifts to the non-moving party to produce concrete evidence sufficient to establish a genuine unresolved issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. at 322-24. The court then must view the facts in the light most favorable to the non-movant and give that party the benefit of all reasonable inferences from the evidence that can be drawn in that party's favor. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000). The court neither weighs evidence nor resolves material factual issues but only determines whether, after adequate discovery, any such issues remain unresolved because a reasonable factfinder could decide for either party. *See Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249; *Gibson v. Am. Broad. Corp.*, 892 F.2d 1128, 1132 (2d Cir. 1989). However, neither conclusory statements, conjecture, nor speculation suffice to defeat summary judgment. *See Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir.1996).

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

IV. ARGUMENT

A. THE DEFENDANTS ARE LIABLE FOR THE DEATH OF THE PLAINTIFFS' PET BECAUSE IT WAS A NATURAL AND FORESEEABLE CONSEQUENCE OF THE DEFENDANTS' ILLEGAL ENTRY ONTO THE PLAINTIFF'S PROPERTY.

1. Plaintiffs Possessed a Reasonable Expectation of Privacy in the Yard Surrounding their Home Because it Constituted Curtilage.

The Fourth Amendment protects the privacy interest people have in their dwelling place by requiring police to have a warrant or valid exception before entering and searching the home. This “heightened privacy interest afforded to a dwelling place extends to the curtilage, which has been described as an area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life.” *United States v. Hayes*, 551 F.3d 138, 145-46 (2d. Cir. 2008), *quoting Oliver v. United States*, 466 U.S. 170, 180 (1984). Thus, any illegal entry into a home’s curtilage is equivalent to an illegal entry into the home itself. In determining whether a particular area constitutes curtilage, the touchstone inquiry is “whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.” *United States v. Dunn*, 480 U.S. 294, 300 (1987). There are four factors that bear upon the question of whether an area is curtilage:

(1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by.

Brocuglio v. Proulx, 478 F. Supp. 2d 297, 302-03 (D. Conn. 2007), *aff'd*, 2009 WL 1059896 (2d Cir. Apr 21, 2009), *citing Dunn*, 480 U.S. at 301. These four factors are nonexclusive and not intended to be a mechanical formula. *Id.*, at 303. They are merely “guidelines meant to shed light on the ultimate question whether an individual has a reasonable expectation of privacy in a

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

given area; the factors really have no independent relevance aside from guiding a court's reasonable expectation of privacy analysis.” *Id.*, at 303.

Whether the proximity of the area to the house supports a finding of curtilage depends on the distance from the dwelling and the neighborhood in which the dwelling is located. *United States v. Reilly*, 76 F.3d 1271, 1275-76 (2d Cir. 1996). In general, however, “the closer the area is to the home, the more reasonable an inference that the area is curtilage.” *Hart v. Myers*, 183 F. Supp. 2d 512, 522 (D. Conn. 2002.) “Although there may not be an actual legal presumption that a fenced-in back yard is curtilage, curtilage is often defined as the area immediately adjoining the home.” *Brocuglio*, 478 F. Supp. 2d, at 304. See, also, *State v. Brocuglio*, 264 Conn. 778 (2003). In order for the second factor to weigh in favor of the party claiming the area in question is curtilage, it is not necessary for the fence to completely encircle the area. See, e.g., *Reilly*, 76 F.3d at 1277-78 (2d Cir. 1996)(dilapidated fencing on three sides of an area supports a determination that the area is curtilage). Privacy accorded to curtilage will not be defeated simply because an officer can see over or around a fence from a lawful vantage point. *Brocuglio v. Proulx*, 478 F. Supp. 2d at 306-307. The third factor is whether the property is used to “harbor those intimate activities associated with domestic life and the privacies of home.” *Reilly*, 76 F.3d at 1277-78. The relevant inquiry is the “actual use of the property, not the knowledge that the officers had or should have had about use at the time of their entry.” *Id.*, at 1278 (citing *Dunn*, 480 U.S. at 305). In regard to the fourth factor, courts should consider whether the area in question was visible from a place where police officers could be legally. See, *Brocuglio*, 478 F. Supp. 2d, at 305.

In this case, all four factors weigh conclusively in favor of the determination that the land

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

surrounding the house located at 297 Enfield Street was curtilage. The yard was immediately adjacent to the home. Ex. SJ-7. The entire property was enclosed by fences, with openings only for the driveway and a gated walkway. The plaintiffs used their rear yard as a normal family would: to cook, eat, entertain, and as a safe place where a child could play and care for the family pets. By their own admission, the defendants could not see into the rear yard at 297 Enfield Street until they reached the northeast (rear) corner of the house; thus portions of the yard were effectively shielded from public view. O'Hare Dep., Ex. SJ-2, at 51-52. Finally, the plaintiff had taken steps to warn the public away from his property by posting "Beware of Dog" signs in places that were easily visible from the street. Indeed, O'Hare observed one of these signs. O'Hare Dep., Ex. SJ-2, 69-70.

No one can seriously dispute the fact that the rear yard of the plaintiff's home constituted curtilage protected from warrantless government intrusion in violation of the Fourth Amendment in the same manner as the residence itself. Therefore, the court must apply Fourth Amendment jurisprudence in this case as it applies to any warrantless entry of the home.

2. The Defendants Entered the Plaintiff's Property Without a Warrant or Valid Exception to the Warrant Requirement

The warrant requirement has special application where the place to be searched is a person's home. It is a basic tenet and perhaps one of the most fundamental notions in our society that a person's home is his castle. *See, Payton v. New York*, 445 U.S. 573, 585 (1980) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). The warrant requirement ensures that this fundamental right to be secure in one's home is jealously guarded. The United States Supreme Court has long recognized this doctrine:

The right of officers to thrust themselves into a home is also a grave concern, not

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 14 (1948). Accordingly, warrantless searches are *per se* unreasonable. *See, Payton v. New York*, 445 U.S. at 587 (absent exigent circumstances, home may not be entered without warrant); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (extending *Payton* to misdemeanors). “A warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.” *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)(gathering cases); quoting *Payton*, 445 U.S., at 587-88. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. *Kyllo v. United States*, 533 U.S. 27 (2001). Certainly no exception applies here.

The two recognized exceptions to this strict prohibition against entering a person’s home without a warrant in a criminal context are consent and exigent circumstances. *United States v. You*, 198 F. Supp. 2d 393 (2d. Cir 2002) citing *Steagald v. United States*, 451 U.S. 204, 214 n.7 (1982) (“Absent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant.”) Since there is no claim of consent, the court must look only to whether some kind of exigency or emergency existed.

In *Payton*, the Supreme Court did not reach the issue of what type of circumstances constituted “exigency,” preferring to leave to the lower courts “the initial application of the exigent-circumstances exception.” *Welsh v. Wisconsin*, 466 U.S. at 749. The Court has noted, however, that the exceptions are “‘few in number and carefully delineated,’ and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

searches or arrests.” *Id.*, at 749-50. “The three general categories which the [Supreme] Court has identified as emergency situations are those involving (1) danger to human life, (2) destruction of evidence and (3) flight of a suspect.” *State v. Guertin*, 190 Conn. 440, 448 (1983), *citing Johnson v. United States*, *supra*. When these factors are applied to a search of premises for evidence, courts are particularly focused on the police officers’ objective belief that incriminating evidence will be destroyed or transferred before a search warrant can be obtained. *See, e.g. MacDonald*, 916 F.2d 766, 769 (2d. Cir. 1990); *United States v. Atherton*, 936 F.2d 728, 732 (2d. Cir. 1991); *United States v. Schaper*, 903 F.2d 891, 894- 95 (2d Cir.1990).

Here, the police did not have any lawful basis to enter the plaintiffs’ property. It is undisputed that the defendants did not have a warrant or encounter anyone capable of providing consent. There was clearly no emergency situation involving a danger to human life. Likewise, there was no evidence that a suspect might flee, since O’Hare and Pia entered the property solely to look for firearms purportedly located in an abandoned Nissan on the property. Furthermore, the defendants had no reason to believe that these firearms were in danger of being destroyed. Aside from the inherent difficulty in destroying a gun, the information the defendants possessed indicated that the guns were hidden in an abandoned car, which made their imminent destruction or transfer highly unlikely.

The defendants received information second hand, through Laureano. Laureano, in turn, learned about these weapons from Mr. Hemingway, a known criminal, arrested for narcotics who refused to say how he learned about the alleged existence of the firearms. Hemingway was not a reliable informant. When the defendants arrived at 297 Enfield Street, they saw no vehicle at all on the property. This should have cast significant doubt over Hemingway’s uncorroborated “tip,”

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

and signaled to the defendants that they needed to reconsider their approach.

A third exception to the warrant requirement, sometimes recognized in a non-criminal context, is clearly inapplicable here: “Local police officers, unlike federal officers, frequently . . . engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). This doctrine allows for a police officer to render aid or assistance to citizens that the officers reasonably believe require it. *U.S. v. Dunbar*, 470 F. Supp. 704, 707 (D. Conn., 1979)(discussing possible scenarios in which the community caretaking function applies). In *Cady v. Dombrowski*, police removed a revolver from an impounded vehicle “to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.” *Cady*, 413 U.S. at 443. The Supreme Court found that, because the car had been towed according to standard police procedure, and the lot to which the car was towed was not secure, removing the revolver out of concern for public safety was a reasonable course of action. *Id.*, at 448. The Court in *Cady* relied, in part, on the principle that people have a lesser expectation of privacy in automobiles than in homes. The caretaker function must be narrowly interpreted due to the likelihood of abuse. *Dunbar*, 470 F. Supp., at 708 (“The Fourth Amendment stands against initiating a new line of cases in which the officer says, ‘I thought he was lost.’”). In *Gombert v. Lynch*, 541 F. Supp. 2d 492 (D. Conn. 2008), police obtained a warrant permitting them to search the plaintiff’s house and arrest the plaintiff. *Id.*, at 494. The defendant police officers then searched the plaintiff’s car, which was parked in the driveway. *Id.* The officers attempted to justify their search as a community caretaking function. The court rejected this argument because the car was parked

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

lawfully on the plaintiff's property and not otherwise to be impounded. *Id.*, at 500. Since the community caretaking function is not objectively reasonable in this instance, courts are not free to consider the police officers' subjective intent while engaging in a Fourth Amendment analysis. *See, e.g., Brendlin v. California*, 551 U.S. 249, 259-260 (2007); *Whren v. United States*, 517 U.S. 806 (1996).

Thus, the community caretaking exception simply does not apply in this case. The plaintiff addresses this argument only because there is a suggestion in Laureano's police report that he relayed the information he received from Hemingway out of a "duty to keep the citizens of Hartford safe." While Laureano's subjective motives for conveying a tip are certainly within the bounds of police procedure, they do not justify the unlawful actions of other officers into objectively reasonable conduct. The defendants' actions here clearly fell outside the outer realm of the community caretaking doctrine, even assuming the defendants' entry onto the plaintiffs' property was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." As noted earlier, there was no existing emergency – real or imagined – which required immediate action and, therefore, this case is similar to *Gombert v. Lynch*. Even *Cady v. Dombrowski*, where the Supreme Court first discussed the caretaker function, involved an impounded motor vehicle. Therefore, even if the defendants observed a car on the plaintiffs' property, which clearly they did not, it would be located in a private and fenced backyard, and not in an unsecured public lot. Therefore, even if the defendants could have seen an abandoned car from a lawful vantage point, the community caretaking function would not extend to barging into the plaintiff's rear yard with guns drawn to search any vehicle they may encounter there.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Therefore, accepting the defendants' version of events as if they were true, it is undisputed that the defendants violated the Fourth Amendment by illegally entering and searching the plaintiff's property and no exception to the warrant requirement applies.

3. Shooting and Killing the Family Pet is a Natural and Foreseeable Consequence of the Defendants' Illegal Entry

Under basic principles of tort law, the defendants are liable for damage proximately caused by their illegal actions. Under § 1983 jurisprudence, tort defenders are liable for the natural consequences of their actions. *Kerman v. City of New York*, 374 F.3d 93, 126 (2d. Cir., 2004). "Thus, an actor may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties." *Id.*, at 126-27. *See also, Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d. Cir. 1998)(proximate cause analysis appropriate in §1983 cases); *Cooper v. City of Hartford*, 2009 WL 2163127 (D. Conn., July 21, 2009)(police may be held liable for a wrongful death because of defendant officers' use of excessive force on an already wounded individual).

Here, the defendants entered the curtilage of the plaintiff's home without a warrant. They had their firearms drawn before they entered the backyard. The plaintiff resided at the property with his family and his dogs, and had exclusive use of this property. He posted signs on three sides of his house reading "Beware of the Dog." Thus, the defendants had express warning of the likely existence of dogs somewhere on the property. It is entirely foreseeable that a family with dogs would allow them to be in a fenced-in back yard, and it is equally foreseeable that a dog would bark and pursue an unknown person who trespassed and then abruptly ran away. Therefore, by entering the plaintiffs' private residential property with their firearms drawn where they knew or should have known of the existence of dogs, and then by running away, the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

defendants created a situation in which the death of a family pet was not only foreseeable, but preordained.

B. THE DEFENDANTS ILLEGALLY SEIZED THE PLAINTIFFS' PROPERTY BY SHOOTING AND KILLING THE DOG.

The Fourth Amendment provides for the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend. IV. Dogs are widely recognized to be “effects” under the Fourth Amendment, and their destruction constitutes a “seizure.” *See, e.g., Dziekan v. Gaynor*, 376 F. Supp.2d 267, 270 (D. Conn. 2005); *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir.2005); *Altman v. City of High Point*, 330 F.3d 194, 205 (4th Cir. 2003); *Brown v. Muhlenberg Tp.*, 269 F.3d 205, 210 (3d. Cir. 2001). As with any Fourth Amendment analysis, the touchstone inquiry is whether the state actor’s conduct was reasonable. *Dziekan v. Gaynor*, 376 F. Supp. 2d, at 271. Even if police are lawfully on property, they can not simply kill family pets. While it is true that the government has an interest in allowing law enforcement officials to protect themselves, *see, Altman*, 330 F.3d at 205, private citizens also have a clear interest in ensuring that their pets and other effects are safe within the confines of their property. *See, e.g., Hatch v. Grosinger*, 2003 WL 1610778 at *5 (D.Minn., March 3, 2003). Thus, the state may not, consistent with the Fourth Amendment, “destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody.” *Brown*, 269 F.3d at 211 cited in *Warboys v. Proulx*, 303 F.Supp.2d 111, 117 (D.Conn. 2004). “The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene.” *Dziekan*, 376 F. Supp.2d at 271.

There are several factors courts consider when determining whether the shooting of a

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

domestic animal is reasonable. One of these is the breed of the dog that the defendant perceived as a threat. *See, e.g. Altman*, 330 F.3d at 206 (the fact that a pit bull is a “dangerous attack dog” supported a finding that the defendant acted reasonably in killing it); *Warboys*, 303 F.Supp.2d at 118 (“The fact that the approaching dog was a pit bull is [a] . . . factor that supports the court’s conclusion that it was objectively reasonable for the officer to have responded to the situation as he did.”)

Another factor is whether the officers were aware of the presence of dogs before entering the property. In *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, for example, the defendant police officers entered a private residence to gather evidence against a motorcycle club. The officers obtained a warrant a week before the raid, had ample time to survey the property, and were well aware that dogs were at the residence. *Hells Angels*, 402 F.3d at 968. Yet the court found in that case that “despite a week to plan for the entry, the officers developed no realistic plan other than shooting the dogs while serving the search warrants.” *Id.*, at 976. The officers argued that killing the dogs was necessary for the safety of the officers, but the district court found that argument unpersuasive because the officers knew that the dogs might present an obstacle and could have developed alternate strategies. *Id.*, at 977.

In this case, O’Hare and Pia were likewise aware that dogs might be present on the property, since O’Hare, at least, saw the “Beware of the Dog” signs posted on the house. Whatever the reliability of the information that the defendants possessed, it was limited to the location of firearms in an abandoned vehicle on private residential property. Therefore there was no need for speed or stealth and certainly no basis to eschew the warrant requirement. Like the defendant police officers in *Hells Angels*, the defendants here could have developed a strategy in

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

case they encountered the dog to which the warning signs referred. Pia recognized the dog the defendants encountered once on the property as a St. Bernard, a breed best known as docile service dogs, not as “dangerous attack dogs.” However, unlike the officers in *Hells Angels*, who possessed a search warrant, the defendants here did not have any legitimate reason for entering the side or back yard of the plaintiff’s property. These defendants, therefore, acted unreasonably by entering private residential property without a warrant, and failing to devise a strategy in case they encountered the dog which they had reason to believe was present. Thus, the execution of the plaintiffs’ pet by O’Hare constitutes an unreasonable seizure in violation of the Fourth Amendment. Moreover, Pia had a duty to stop O’Hare from engaging in this illegal conduct but failed to do so.

C. DEFENDANTS VIOLATED THE CONNECTICUT CONSTITUTION

Article First, § 7 of the Connecticut Constitution provides: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures.” This provision often provides greater protection to citizens’ right to privacy than the Fourth Amendment to the federal constitution:

It is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights.... Indeed, this court has determined that, in certain respects, article first, § 7, of the state constitution affords greater protection than the fourth amendment to the United States constitution.

State v. Davis, 283 Conn. 280, 305 (2007). For example, in *State v. Geisler*, 222 Conn. 672, 680-81 (1992), the Connecticut Supreme Court determined that the police officers’ warrantless entry into the defendant’s home may have been justified under the U.S. Constitution, but not under the State Constitution.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

The holdings of the Connecticut Supreme Court, similar to federal court rulings, presume that the warrantless entry onto property is invalid, and place a heavy burden on the police to prove that the entry was valid. *See, State v. Aviles*, 277 Conn. 281, 292-93 (2006); *State v. Holmes*, 51 Conn. App. 217, 220 (1998) ("[b]ecause a warrantless search is presumptively invalid, the state has the burden of affirmatively demonstrating a recognized exception to the warrant requirement"), *cert. denied*, 248 Conn. 904 (1999). The test for whether an entry was valid under the emergency exception is governed by a standard of objective reasonableness. *Aviles*, 277 Conn. at 293. "The reasonableness of a police officer's determination that an emergency exists is evaluated on the basis of facts known at the time of entry." *Id.*, citing *State v. Blades*, 225 Conn. 609, 619 (1993).

As the preceding sections make clear, the standards for evaluating a warrantless entry under the Connecticut Constitution are more stringent than federal standards, which were clearly violated. Thus, in the absence of a valid emergency, the defendants are presumed to have violated the Connecticut Constitution by their actions. *Binette v. Sabo*, 244 Conn. 23, 34 (1998).

D. THE DEFENDANTS' ILLEGAL ENTRY ONTO THE PLAINTIFF'S PROPERTY CONSTITUTED A TRESPASS.

The elements a plaintiff must prove for a successful trespass claim are: "(1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury." *City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 87 (2007), quoting *Avery v. Spicer*, 90 Conn. 576, 579 (1916). All four elements are easily satisfied in the present case, as set forth in the previous sections. Glen Harris owned the property at 297 Enfield Street and lived there with his family and dogs. Thus, he had a possessory interest in the land. The defendants

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

intentionally entered and intruded upon the land without permission, warrant, or justifiable emergency. Finally, the entry onto the land caused direct injury to the plaintiff because O'Hare shot and killed the plaintiffs' pet while on the plaintiffs' property, and in front of his minor daughter. Therefore, the defendants are liable for the tort of trespass.

E. SHOOTING AND KILLING THE PLAINTIFFS' PET CONSTITUTED CONVERSION.

The tort of conversion occurs when one, without authorization, "assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights.... Thus, [c]onversion is some unauthorized act which deprives another of his property permanently or for an indefinite time." *Sullivan v. Thorndike*, 104 Conn. App. 297, 307 (2007), quoting *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770-71, (2006). In order to prove a claim of conversion, the plaintiff must show (1) that he was the owner of the property, in this case, the dog; (2) the plaintiff was deprived of his property permanently; and (3) the defendants' act which deprived the plaintiff of his property was unauthorized. Here, there is no dispute that the plaintiff owned Seven, and that O'Hare destroyed the dog, thereby permanently depriving the plaintiff of his property. The plaintiffs have discussed in Sections A and B, *supra*, how it is undisputed that the defendants were not authorized to be on the plaintiff's property or shoot his dog. Therefore, the defendants are liable under a theory of conversion for the death of the family pet.

F. THE CITY OF HARTFORD IS LIABLE TO THE PLAINTIFF UNDER A THEORY OF INDEMNIFICATION FOR THE ACTS OF DEFENDANTS O'HARE AND PIA.

Pursuant to Connecticut General Statutes §§ 1-101a and 7-465 the City of Hartford is required to pay, on behalf of its employees, damages arising from the negligent or willful and wanton acts, and for violations of the plaintiff's constitutional rights. Both statutes require notice to the municipality. Here, the plaintiff mailed a Notice of Intent to Sue to the Town Clerk of the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

City of Hartford on or about April 9, 2007, and the Town Clerk received the Notice of Intent to Sue on or about April 10, 2007. Ex. SJ-17. Therefore, assuming O'Hare and Pia are liable to the plaintiffs on any theory, the City of Hartford is equally liable to pay the plaintiffs for any damages caused by the tortious and unconstitutional acts of O'Hare and Pia.

V. CONCLUSION

For the foregoing reasons, the plaintiff, Glen Harris, requests that the Court grant his motion for partial summary judgment.

THE PLAINTIFF–
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
Fed Bar #ct00119
(860) 278-3500
Fax: (860) 278-6393
Email: Civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Summary Judgment\SumJudgeMemo.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Slip Copy, 2009 WL 2163127 (D.Conn.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
D. Connecticut.
James COOPER, Executor of the Estate of James C. Carter, Plaintiff,
v.
CITY OF HARTFORD, et al., Defendants.

Civil Action No. 3:07-CV-823 (JCH).
July 21, 2009.

A. Paul Spinella, Law Offices of A. Paul Spinella & Associates, Hartford, CT, for Plaintiff.

John Rose, Jr., Corporation Counsel, Nathalie Feola-Guerrieri, City of Hartford, William J. Melley, III, Law Offices of William J. Melley III, Hartford, CT, for Defendants.

RULING RE: DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT (Doc. No. 50)

JANET C. HALL, District Judge.

*1 Plaintiff James Cooper, Executor of the Estate of James C. Carter ("Cooper"), brings this action against the City of Hartford ("City"), Chief Patrick J. Harnett, in his official and individual capacity, and Steven Miele, Shaun St. John, Victor Otero, and Jeffrey Hopkins, in their individual capacities (together, "defendant police officers").^{FN1} In Count One, Cooper alleges that Carter was deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. § 1983. In Count Two, Cooper alleges that Carter was deprived of his rights under Article first, sections 7 and 9 of the Connecticut Constitution. In both Counts, Cooper alleges that the defendant police officers deprived Carter of his right to be free from unreasonable searches and seizures, false arrest, and the use of excessive force; that the defendant police officers denied or unreasonably delayed Carter's ability to obtain lifesaving medical treatment; that the City and Harnett had in effect de facto policies, practices, and customs that exhibited deliberate indifference to the constitutional rights of citizens and residents of Hartford; and that the City and Harnett failed to properly investigate Carter's and similar claims of misconduct, exhibiting deliberate indifference to the constitutional rights of citizens and residents of Hartford.^{FN2} In Count Three, Cooper alleges that defendant police officers wrongfully caused Carter's death, are liable for their conduct, and that the City is also liable for the negligent acts and omissions of the police officers. In Count Four, Cooper alleges that the defendant police officers engaged in negligent conduct that caused Carter emotional distress. In Count Seven,^{FN3} Cooper seeks indemnification from the City for any damages recovered from defendant police officers as to all Counts. Pending before the court is defendants' Joint Motion for Summary Judgment (Doc. No. 50). For the reasons that follow, defendants' Motion is GRANTED in Part and DENIED in Part.

^{FN1}. The plaintiff's brief does not address the capacity in which the defendants are sued, and the Complaint is somewhat ambiguous on the question. *Compare* Compl. at ¶ 2 (all individual defendants sued in their official and individual capacities), *with id.* at ¶¶ 9-13 (Harnett sued in his individual and official capacity, others are sued in their individual capacities only), and *id.* at caption (same). The court will accept the more specific language of ¶ 9-13 and the caption as controlling.

^{FN2}. In his Memorandum in Opposition to defendants' Joint Motion for Summary Judgment, Cooper abandons his failure to supervise allegations against Harnett. Opp'n at 46 n. 5, 50. Cooper consents to the granting of summary judgment as to Harnett, *id.*,

conceding that the record does not evidence the personal involvement of Harnett as would be necessary to hold him liable. See *Farrell v. Burke*, 449 F.3d 470, 484 (2d Cir.2006) (quoting *W right v. Smith*, 21 F.3d 496, 501 (2d Cir.1994)) ("It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983."). The court will therefore GRANT summary judgment as to claims against Harnett in Counts One and Two (Counts Three, Four, and Seven are not brought against Harnett), and will not further consider these claims.

FN3. The Complaint does not contain a Count Five or Count Six.

I. FACTUAL BACKGROUND^{FN4}

FN4. For the purposes of the instant motion, the court accepts facts undisputed by the parties as true and resolves disputed facts in favor of the plaintiff where there is evidence to support his allegations.

In the late evening of May 14, 2005, Sergeant Steven Miele and Officers Shaun St. John, Jeffrey Hopkins, and Victor Otero ("defendant police officers" or "officers") were assigned to a four-officer "Disorder Control Team Detail" in Hartford, Connecticut. Defendants' Joint Local Rule 56(a)(1) Statement, at ¶ 2 (hereinafter "Defs.' 56(a)(1)").^{FN5}

FN5. When the court cites a section of the Defendants' Joint Local Rule 56(a)(1) Statement that has been denied by the plaintiff, the court is citing only the uncontested portion of that statement.

At approximately 10:35 p.m. that same evening, Tara Wilson, a resident of Hartford, left her home in her car, heading for her sister's house. Affidavit of Tara Wilson, Pl.'s Ex. 7, at ¶¶ 2-4 (hereinafter "Wilson Aff."). Wilson drove a dark-colored Pontiac Bonneville. *Id.* ¶ 5. She had traveled only about 0.3 miles, to the vicinity of 161 Martin Street in Hartford, when she encountered heavy pedestrian traffic. *Id.* ¶¶ 1, 6-8; Google Map, Pl.'s Ex. 14 (hereinafter "Google Map"). Neighborhood residents soon placed James Carter, who had just been shot several times, in the back of her vehicle, and Carter's girlfriend got in the passenger seat of her vehicle. Wilson Aff. at ¶¶ 10-13. Wilson was told to drive to the hospital, and began to drive at a high rate of speed towards St. Francis Hospital, about 2.1 miles away. *Id.* ¶¶ 14-15; Google Map. She drove southbound on Martin Street, cut over one block to Garden Street, and continued southbound. Wilson Aff. at ¶¶ 15-17; Google Map.

*2 At around the same time, the Hartford Police Department responded to reports of shots fired at 161 Martin Street in Hartford. Defs.' 56(a)(1) at ¶¶ 3-4; Police Reports, Def.'s Ex. 6; Wilson Aff. at ¶¶ 1-22. Officer Lollar, while responding to the scene, observed a black-colored Pontiac Bonneville traveling southbound on Martin Street away from the vicinity of the shooting. Report of Officer Lollar, Def.'s Ex. 6, at 21. Officer Lollar informed the dispatcher, who relayed the description of a "dark-colored" vehicle fleeing the area that may have contained shooters or a victim. Defs.' 56(a)(1) at ¶¶ 6-7; Deposition of Jeffrey Hopkins, Def.'s Ex. G, at 19-20 (hereinafter "Hopkins Dep."); Deposition of Stephen Miele, Def.'s Ex. I, at 17-19 (hereinafter "Miele Dep."); Deposition of Shawn St. John, Def.'s Ex. H, at 11-12, 15-16 (hereinafter "St. John Dep."). Defendant police officers (Miele, St. John, Hopkins, and Otero) observed a vehicle that they believed to be similar to the description of the vehicle described on the radio traveling southbound at a high rate of speed on Garden Street. Hopkins Dep. at 19-20; Miele Dep. at 17-19; St. John Dep. at 11-12, 15-16. Defendant police officers activated their police cruiser's lights and sirens and pulled the Bonneville over at the corner of Garden Street and Mather Street. Defs.' 56(a)(1) at ¶ 9. At the time she was pulled over, Wilson had traveled about 0.8 miles from the scene of the shooting, and remained about 1.3 miles from St. Francis

Hospital. *Id.*; Google Map.

As the officers approached the vehicle, the driver, Tara Wilson, exited the vehicle and immediately informed the officers that the back seat passenger had been shot and that she was trying to bring him to the hospital. Defs.' 56(a)(1) at ¶ 11; Wilson Aff. at ¶ 25. The officers approached the backseat of the vehicle with their guns drawn. *Id.* ¶ 27. Upon opening the back door, they immediately observed that Carter was bleeding and injured, laying down in the back seat. St. John Dep. at 13-14. Carter asked the defendant police officers to take him to the hospital. *Id.* The police officers called for gloves and did not touch Carter until another cruiser arrived and supplied blue gloves to the officers. Wilson Aff. at ¶¶ 33-34; St. John Dep. at 31-32. They put on the blue gloves, and began grabbing at Mr. Carter and yelling for him to, "Sit the fuck up." Wilson Aff. at ¶ 35. One or more officers grabbed him by the chest and pulled him upright, while others grabbed his legs and pushed them to the floor. Wilson Aff. at ¶¶ 36-37. Carter then tried to get out of the vehicle, but the officers restrained him and a struggle ensued. Wilson Aff. at ¶ 39. They then forcibly removed Carter from the rear seat of the vehicle. Miele Dep. at 29-31, 56, 59; St. John Dep. at 14.

After the officers removed Carter from the vehicle, one or more officers called for an ambulance, at approximately 11:00 p.m. Hopkins Dep. at 27-28; EMS Heartbeat Dispatch Summary Record, Pl.'s Ex. 9 (hereinafter "EMS Record"). Defendant police officers attempted to administer first aid to him, but Carter resisted. Hopkins Dep. at 32-35, Miele Dep. at 25-26; St. John Dep. at 33-34. Carter told the officers that he wanted to leave to go to the hospital, and he attempted to leave. Hopkins Dep. at 33-34; St. John Dep. at 34; Miele Dep. at 23. The officers physically restrained him, forcing him to remain at the corner of Garden and Mather Streets pending the arrival of the ambulance, and holding him to the ground to enforce compliance with their orders. Hopkins Dep. at 32-24; St. John Dep. at 15, 21-23. They did not, however, handcuff him. Defs.' 56(a)(1) at ¶¶ 24, 31. The officers prevented Carter from leaving the scene despite his verbal requests to leave, to not be detained, and to continue on the way to the hospital. Hopkins Dep. at 32-34; St. John Dep. at 15, 21-23, 34; Miele Dep. at 23, 70-72. The defendant police officers subjectively believed that they lacked probable cause to suspect Carter of a crime. Hopkins Dep. at 22-23, 27, 38; Miele Dep. at 26-27; St. John Dep. at 15-16, 33.

***3** The Hartford Police Department has a written policy providing that sick or injured individuals shall be transported to the hospital by ambulance except in exigent circumstances, when the policy contemplates such an individual being transported by police cruiser. Hartford Police Department Policy and Procedure 7-17: Emergency Medical Services, Oct. 6, 1982, Def.'s Ex. 2. Separately, the policy also provides that the assigned ambulance will transport the patient unless conditions exist which would jeopardize human life. *Id.* The defendant police officers, like all Hartford officers, received First Aid, CPR, and "MRT" training. Defs.' 56(a)(1) at ¶¶ 22-23. In spite of the written policy providing for transport of injured individuals by police cruiser in exigent circumstances, the defendant police officers followed an unwritten practice of the Hartford Police Department of only transporting sick or injured individuals to the hospital by ambulance. Miele Dep. at 41-43; St. John Dep. at 22-26. On the night in question, the officers were aware that ambulance response might be delayed because there was another shooting that night and they were awaiting the arrival of an ambulance from the location of that shooting. Wilson Aff. at ¶ 42. The officers nevertheless refused to transport Carter to the hospital in their police cruiser. Miele Dep. at 41-43; St. John Dep. at 22-26. In doing so, they followed orders from Miele, the sergeant in charge at the scene. St. John Dep. at 22-23.

At 11:02 p.m., the Fire Department arrived and took control of Carter's emergency medical needs. Defs.' 56(a)(1) at ¶ 25. At 11:05 p.m., the first ambulance, American Medical Response ("AMR") Unit 903 arrived. *Id.* ¶ 26. At 11:06 p.m., AMR Units 915 and 917 arrived. *Id.* ¶ 27. The AMR units applied a backboard and provided emergency medical treatment. *Id.* ¶ 28. They began to address Carter's injuries at the scene. *Id.* ¶¶ 28-30. At 11:21 p.m., the ambulance carrying Carter departed the scene, arriving at St. Francis Hospital at 11:22 p.m. EMS Record.

Prior to Wilson's car being pulled over, Carter was engaged, alert, and talking. Wilson Aff. ¶¶ 18, 23-24. He continued to have signs of life as he first interacted with the officers, but his condition progressively worsened. *Id.* ¶ 41. By the time he reached the hospital, he had lost consciousness and stopped breathing. Operative Report, Pl.'s Ex. 17. He died of his gunshot wounds while at the

hospital. *Id.*

The Office of the Chief Medical Examiner of the State of Connecticut performed an autopsy on Carter and determined that the cause of death was "multiple gun shot wounds," and the manner of death was "homicide." Report of Ira J. Kanfer, Associate Medical Examiner, Def.'s Ex. D. This information was recorded on Carter's death certificate. Death Certificate of James Curtis Carter, Def.'s Ex. E. Dr. Peter J. Paganussi, plaintiff's expert, issued a report opining to a reasonable medical certainty that, although the shooting caused Carter's death, Carter was deprived of the opportunity for successful treatment as a result of the delay in transporting Carter to the hospital. Report of Dr. Peter J. Paganussi, Pl.'s Ex. 8 (hereinafter "Paganussi Rep.").

*4 Cooper filed a written complaint with the Hartford Police Department's Internal Affairs Division contending that the officers had engaged in misconduct. Defs.' 56(a)(1) at ¶ 38. An investigation by Internal Affairs concluded that complaints against the officers were unfounded, meaning that "[t]he investigation indicates that the act or acts complained of did not occur or failed to involve police personnel." Investigative Report, Def.'s Ex. 5.

II. STANDARD OF REVIEW

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *White v. ABCO Engineering Corp.*, 221 F.3d 293, 300 (2d Cir.2000).

Once the moving party has met its burden, in order to defeat the motion the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial," *Anderson*, 477 U.S. at 255, and present such evidence as would allow a factfinder to find in her favor, *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir.2000).

When assessing the record, the trial court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *Anderson*, 477 U.S. at 255; *Graham*, 230 F.3d at 38. "This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party." *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir.2000). "When reasonable persons, applying the proper legal standards, could differ in their responses to the question" raised on the basis of the evidence presented, the question must be left to the factfinder. *Soloqub v. City of New York*, 202 F.3d 175, 178 (2d Cir.2000).

III. ANALYSIS. Count One: Claims Against Defendant Police Officers

In Count One, Cooper alleges that the defendant police officers violated Carter's constitutional rights. Count One targets several different actions undertaken by defendants. The court will evaluate these actions separately according to the relevant constitutional standards.

1. Qualified Immunity: Initial Inquiry

Defendant police officers have contended that, even if the court concludes that the facts viewed in the light most favorable to the plaintiff show that they violated Carter's constitutional rights, that they are entitled to qualified immunity. "Qualified immunity protects officials from liability for civil damages as long as 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Gilles v. Repicky*, 511 F.3d 239, 243 (2d Cir.2007) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Second Circuit has explained the procedure courts are to follow in addressing qualified immunity:

When a defendant officer charged with violations of federal constitutional rights invokes qualified immunity to support a motion for summary judgment, a court must first consider a threshold question: Do the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right? If the facts, viewed in that light, do not establish a violation of a constitutional right, there is no necessity for further inquiries concerning qualified immunity, and the officer is entitled to summary judgment.

*5 *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir.2007) (citations and internal quotation marks omitted).

The court will therefore first turn to the question of whether the facts establish the violation of a constitutional right. If they do, the court will proceed to the second part of the inquiry-whether the right was clearly established. Gilles, 511 F.3d at 244.

2. Unreasonable Seizure and False Arrest

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fourteenth Amendment extends the protections of the Fourth Amendment to searches and seizures by state and local officers, such as the defendant police officers. See Elkins v. United States, 364 U.S. 206, 213 (1960). A traffic stop, however brief or limited, "constitutes a seizure for Fourth Amendment purposes, and thus must not be unreasonable." Gilles v. Repicky, 511 F.3d 239, 244-45 (2d Cir.2007) (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)). When a police officer makes a traffic stop, the driver and passengers are both seized within the meaning of the Fourth Amendment. Brendlin v. California, 127 S.Ct. 2400, 2403 (2007).

It is undisputed that the vehicle in which Carter was riding was subject to a traffic stop by the defendant police officers. Carter was seized and has standing to challenge the stop. The court must therefore determine whether stop was objectively reasonable:

The Fourth Amendment requires that an officer making [a traffic] stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity. Whether probable cause or reasonable suspicion exists is an objective inquiry; the actual motivations of the individual officers involved in the stop play no role in the analysis.

Holeman v. City of New London, 425 F.3d 184, 189-90 (2d Cir.2005) (citations and internal quotation marks omitted). Further, "[t]he constitutional validity of a stop is not undermined simply because the officers who made the stop were mistaken about relevant facts." United States v. Jenkins, 452 F.3d 207, 212 (2d Cir.2006).

Cooper contends that the defendant police officers lacked reasonable suspicion or probable cause to stop Wilson's vehicle, so that the initial seizure and any subsequent further seizure violated Carter's Fourth Amendment rights. He also argues that, even if there was reasonable suspicion to initially stop the vehicle, any such suspicion quickly dissipated, and the stop therefore lasted longer than was necessary to effectuate its purpose. The defendant police officers counter that the stop was lawful because there is no issue of fact as to whether the officers reasonably believed that the driver, Carter, or the other passenger in the car were armed and dangerous and posed a danger to the officers. They also contend that there is no issue of fact as to whether the officers acted reasonably in not prolonging the stop. The court will separately consider the initial decision to stop the vehicle, Carter's removal from the vehicle, and whether the stop was unduly prolonged.

a. Initial Traffic Stop of Wilson's Vehicle

*6 When the defendant police officers stopped Wilson's vehicle, it is undisputed that they acted in response to Officer Lollar's radio report that a dark-colored vehicle, possibly containing a suspect or victim, was traveling southbound on Martin Street away from the vicinity of the shooting. This report, which followed almost immediately on the heels of the initial radio report that shots had been fired, was called in by one of the initial officers to respond to the scene. By the time the officers encountered Wilson's vehicle, it was on Garden Street, one block west of Martin Street, and approximately 0.8 miles from the scene of the shooting. The radio report identified neither the specific color of the vehicle (referring to it as "dark") nor the specific make. Nevertheless, when the officers encountered Wilson's vehicle shortly after hearing the description on the radio, they believed it to be a match.

The court must determine whether the defendant police officers had probable cause or reasonable suspicion that either Wilson or Carter had committed "a traffic violation or [were] otherwise engaged in or about to be engaged in criminal activity." Holeman, 425 F.3d at 189-90 (citations omitted). Courts reviewing the reasonableness of a stop "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal

wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal citations and quotation marks omitted). The court should not analyze each fact separately, nor need it find that any single factor provides reasonable suspicion on its own. *Id.* Instead, it must engage in a totality of the circumstances inquiry, which accounts for the fact that officers "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *Id.* at 273-74 (citations and internal quotation marks omitted).

In several recent cases, the Second Circuit has addressed the existence of reasonable suspicion in similar circumstances to those of this case. In the recent case of *United States v. Lucky*, the Second Circuit considered whether the police had reasonable suspicion to conduct an investigatory stop on a vehicle that had reportedly been used in a shooting two days earlier. 569 F.3d 101, 103 (2d Cir.2009). The description of the vehicle and the license plate number matched the report, and the vehicle was encountered in the vicinity of where the shooting had taken place. *Id.* at 103, 106. The description of the shooter's height in the report did not match that of the driver of the vehicle, but the court nevertheless found reasonable suspicion, reasoning that the officers did not recall the height of the shooter from the report, that the driver's height was not apparent while he remained inside the car, and that "there was reasonable suspicion at least to speak briefly with whoever was driving a car that had just been used in a shooting, even if it had been clear that the driver had not been the shooter." *Id.* at 106.

*7 In *United States v. Vashja*, the court found reasonable suspicion where officers responding to a call of "either shots fired or a man with a gun" encountered a man across the street who then grabbed his waistband, walked swiftly away from the police car, and then pretended to smoke an unlit cigarette. 282 Fed. Appx. 942, 943-44 (2d Cir.2008) (summary order). In *Holeman v. City of New London*, at around 4:30 am, an officer was investigating a "proowler call" and "followed a car with tinted windows that took a circuitous route through a troubled neighborhood." 425 F.3d at 188. The car hesitated and stopped at a stop sign, followed a route it had already traveled once before, was registered in a neighboring city, and was spotted in a high crime neighborhood. *Id.* at 190. The court found that the officer was entitled to qualified immunity,^{FN6} based on an objectively reasonable belief that there was reasonable suspicion based upon these facts and also that the fact that the officer was investigating a prowler call, he saw no other vehicle on the road, and the car had tinted windows that obstructed his view into the car. *Id.* at 190-91.

FN6. Because *Holeman* was an interlocutory appeal from a denial of qualified immunity, the court decided the qualified immunity issue without first rendering a judgment on whether or not reasonable suspicion existed. 425 F.3d at 190-91.

With this precedent in mind, the court concludes that there are issues of fact as to whether the officers had reasonable suspicion to stop the vehicle. First, Officer Lollar had very limited information about the vehicle and its passengers. He knew that a dark Pontiac Bonneville was traveling from a vicinity where shots had been reported fired, but he did not know whether the vehicle contained a shooter, victim, or unrelated persons that happened to be passing through the area of the shooting. See Hopkins Dep. at 19-20; Miele Dep. at 17-19; St. John Dep. at 11-12, 15-16. Second, the information relayed by the dispatcher and possessed by the defendant police officers—that a dark car ^{FN7} was traveling southbound away from the scene, and that it might contain a shooter or a victim—inherited the flaws of the original report. Unlike the vehicle in *Lucky*, Officer Lollar's report did not link the vehicle in the instant case directly to the shooter or shooting, nor was a license plate number or other clear identifying information provided. Nor, in contrast to the facts of *Vashja* or *Holeman*, did an officer observe the occupants of the vehicle in this case engaged in suspicious behavior. In fact, the officers did not know anything about the occupants of the vehicle or even whether they were actually related to the shooting.

FN7. Although some evidence in the record suggests that the car was identified as a dark-colored Bonneville, viewing the facts in the light most favorable to the plaintiff, the radio report did not identify the car as a Bonneville.

Third, even if Officer Lollar might have had reasonable suspicion to stop the vehicle based upon encountering it in the immediate vicinity of the shooting, the inquiry cannot stop there. If the officers did not reasonably believe that they had encountered the same vehicle referred to in the radio report, then there would be no reasonable suspicion to stop the vehicle.

The defendant officers encountered the vehicle neither at the scene nor on Martin Street, but on a parallel street one block west and about 0.8 miles south of the shooting scene. Several factors weigh in favor of the conclusion that the officers reasonably believed that they had encountered the same vehicle referred to in the radio report. Martin Street, on which the shooting took place, continues south for only three blocks past the scene of the shooting before dead-ending at Spring Grove Cemetery; it could be expected that a car originally spotted traveling southbound on Martin Street might cut over one block to Garden Street in order to continue heading southward. See Google Map, Pl.'s Ex. 14. Similarly, it could also be expected that the car would have traveled just under a mile in the couple of minutes between the initial radio report and when the vehicle was stopped.

***8** In addition, the vehicle was traveling at a high rate of speed. Even if the vehicle was not violating any traffic laws, this factor weighs in favor of a finding of reasonable suspicion.^{FN8} Finally, the officers were responding to a report of shots fired and a rapidly unfolding situation, in which they are entitled to greater leeway to act decisively than if they are afforded more time to analyze the situation and check facts.

FN8. Standing alone, reasonable suspicion that the operator of a motor vehicle has committed a traffic violation can provide justification for a motor vehicle stop. United States v. Stewart, 551 F.3d 187, 193 (2d Cir.2009). However, although defendant police officers testified in their depositions that the vehicle was traveling at a high rate of speed when they pulled it over, they have not asserted that the vehicle's speed alone provided reasonable suspicion that Wilson had committed a traffic violation. See Hopkins Dep. at 20 ("Pass us going southbound at what one would consider to be a speed not reasonable with the area and the speed limit."); St. John Dep. at 12 ("[W]e observed a vehicle traveling southbound down Garden Street at a high rate of speed."); Miele Dep. at 18 ("A vehicle fitting the description traveling at a high rate of speed ... had passed us at that point."). The speed of the vehicle remains a factor that, combined with other factors, may give rise to reasonable suspicion.

Nevertheless, the totality of the circumstances, viewed in the light most favorable to the plaintiff, did not provide the officers with a particularized and objective basis for suspecting that the occupants of Wilson's vehicle were engaged in criminal activity. It is unlikely that Officer Lollar, based on his limited knowledge, had reasonable suspicion to stop the vehicle at the time that he first encountered it. By the time the defendant police officers encountered the vehicle, the basis for stopping the vehicle was no more particularized. Further, because the description was vague, the officers did not have sufficient basis to believe Wilson's vehicle was the same vehicle Lollar had encountered. Given the severity of the crime reported and the possible danger to bystanders or officers of a potentially armed individual traveling away from the scene, had the report of the vehicle leaving the scene been more particularized by including a license plate number or sufficiently detailed description, and had the report reasonably included the fact that the vehicle likely contained an assailant, the court would likely have concluded that no issue of fact existed as to the sufficiency of reasonable suspicion. However, the description of the vehicle in the radio report and its location was vague, the occupants' alleged link to the shooting was tenuous, and there was no description provided of the occupants. The fact that the vehicle was traveling quickly and that the officers had little time in which to analyze the situation is not enough to counteract the lack of particularized information about the vehicle or its occupants. Accordingly, the court cannot conclude that defendant has demonstrated that no issue of fact exists as to the existence of reasonable suspicion to make the stop.

b. Prolonged Detention of Carter/False Arrest

If the initial stop was not justified, then the detention which followed it was also not justified. However, because the court finds *infra* that the defendant police officers are entitled to qualified immunity with regard to the initial stop, the court will separately analyze the detention. The fact that the initial stop may have been justified does not itself justify a prolonged detention.

An investigatory detention, even if initially supported by reasonable suspicion or probable cause, must be "temporary and last no longer than is necessary to effectuate the purpose of the stop." Gilles, 511 F.3d at 245 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion)). "In assessing whether a detention is too long in duration to be justified as an investigative stop, [courts] consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly...." United States v. Sharpe, 470 U.S. 675, 686 (1985). There are not rigid time limitations; a court must engage in case-by-case analysis. See id. at 685-86.

*9 Individuals have a right under the Fourth Amendment to be free from arrest in the absence of probable cause. Gilles, 511 F.3d at 245. "If police officers restrain an individual in a manner that, though not technically an arrest, is nonetheless so intrusive as to be tantamount to an arrest, probable cause is also required." Giles, 511 F.3d at 245 (citation and internal quotation marks omitted). To determine "whether an investigatory stop is sufficiently intrusive to ripen into a de facto arrest," the court must consider:

the amount of force used by the police, the need for such force, and the extent to which an individual's freedom of movement was restrained, and in particular such factors as the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect, including whether or not handcuffs were used.

United States v. Vargas, 369 F.3d 98, 101 (2d Cir.2004) (citation and internal quotation marks omitted).

In this case, assuming that the defendant police officers had reasonable suspicion to stop the vehicle, they acted properly in quickly ascertaining that the car did not contain an armed assailant, but instead, contained a shooting victim. Once they ascertained that Carter was an unarmed victim, even if they had originally had reasonable suspicion to conduct a vehicle stop, the officers no longer had any objective justification to continue to detain Carter or the vehicle. The defendant police officers nevertheless failed to end the detention; they forcibly removed Carter from the vehicle and held him to the ground as they attempted to administer first aid, and prevented him from continuing on to the hospital in Wilson's vehicle or otherwise. Although handcuffs were not used, Carter's freedom of movement was fully restrained, and a reasonable person in Carter's position would not have felt free to leave. At the time at which the detention should properly have ended, the police, given Carter's condition, could reasonably have advised Carter that his medical needs would best be served by waiting for an ambulance. However, the officers had no justification for holding Carter to the ground or refusing to permit him to continue on his way.^{FN9} Carter has therefore demonstrated facts from which a reasonable factfinder could conclude that his continued detention violated the Fourth Amendment.

^{FN9}. Defendants note that it would not have been safe for the police to have permitted the Bonneville to have traveled to the hospital in flagrant violation of the traffic laws, even with a police "escort," as doing so would endanger others. Defs.' Mem. at 10-11. The court agrees, but the Bonneville could also have traveled the remaining 1.3 miles to the hospital in compliance with the traffic laws, and still arrived long before the ambulance. Prior to the initial stop, the defendant police officers did not observe the Bonneville breaking any traffic laws, and they did not detain the vehicle on that basis. Therefore, at the very least, they could not detain the vehicle on the preemptive assumption that, if allowed to go on its way, the Bonneville might break traffic laws in an effort to get to the hospital more quickly.

3. Carter's Removal from the Vehicle/Use of Excessive Force

With regard to Carter's removal from the vehicle, the court must address two interrelated questions: did the defendant police officers have justification to forcibly remove Carter from the vehicle, and did they use excessive force in doing so? Cooper has created an issue of fact as to both questions.

a. Carter's Removal from the Vehicle

In *Maryland v. Wilson*, the Supreme Court held that an officer who lawfully makes a traffic stop may order passengers to exit the car pending the completion of the stop. 519 U.S. 408, 414-15 (1997); see also *Mollica v. Volker*, 229 F.3d 366, 369 (2d Cir.2000) ("[I]f a stop is lawful, passengers and drivers have no Fourth Amendment interest in not being ordered out of the stopped vehicle."). Relatedly, an officer's authority is not limited to ordering passengers out of the vehicle; he may also reasonably restrict passengers' movements. See *Brendlin*, 127 S.Ct. at 2407 ("It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."). Assuming that the initial stop was lawful, the police officers could lawfully order Carter to exit the vehicle at the time of the initial stop.

***10** Nevertheless, viewing the facts in the light most favorable to the plaintiff, the police officers forcibly removed Carter from the vehicle only *after* determining that Carter was an unarmed shooting victim. Once they ascertained that Carter was not armed and that he was in fact an injured victim, not a suspect, they no longer had justification to continue the investigative detention. Defendant police officers insist that they had the right to order Carter to leave the car under *Maryland v. Wilson*, and therefore were justified in forcibly removing him from the car once he began to struggle with them. The court disagrees. Once any justification for the investigatory detention ended, whether or not Carter had yet exited the car, the defendant police officers did not have the right to further restrain Carter. Nor could justification for restraint originate in Carter's need for medical care; the police do not have a right to detain a non-incarcerated individual in order to force him to submit to unwanted medical care.

Finally, defendant police officers argue that because Carter struggled with the police, they were justified in forcibly removing him from the vehicle. Yet as Cooper points out, a rational jury could find that by the time of the struggle, the police had already realized that Carter posed no threat, had committed no crime, and was a severely injured victim. A rational jury could also find that any struggle resulted from Carter's efforts to leave the scene and seek medical attention privately-which was Carter's right-rather than be forced to wait for an ambulance and submit to unwanted first aid by the officers. Under the circumstances, therefore, a rational jury could conclude that the defendant police officers' decision to forcibly remove Carter from the vehicle violated his Fourth Amendment rights.

b. Use of Excessive Force

Claims by a non-incarcerated individual that law enforcement officials used excessive force during a seizure, including an arrest or investigatory stop, are analyzed under the Fourth Amendment's "objective reasonableness" standard. ^{FN10} *Graham v. Connor*, 490 U.S. 386, 388, 395 (1989). A court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake ." *Id.* at 396 (citation and internal quotation marks omitted). A police officer making a lawful arrest or investigatory stop has the right to use some amount of physical coercion, or the threat of it, to effect the stop or arrest. *Id.* A court must examine:

^{FN10} Defendants claim that Cooper seeks to make out a distinct excessive force claim under the Fourteenth Amendment, which they argue is barred by the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386, 395 (1989). In both his Opposition to defendants' Motion for Summary Judgment and his initial Complaint, Cooper appears to confine his excessive force claims to the Fourth Amendment, and does not address the issue of whether he raises a Fourteenth Amendment claim or whether such claim would be barred by *Graham*. The court therefore construes Cooper's excessive force claims as being raised under the Fourth Amendment only.

the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* (citation omitted). The court must judge reasonableness objectively under the circumstances, "from the perspective of a reasonable officer on the scene," and allow for the fact "that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

***11** The court has already concluded that, even if the detention was initially justified, once the defendant police officers ascertained that Carter was not armed and that he was in fact an injured victim, not a suspect, they no longer had any justification to continue the investigative detention. At the time they attempted to remove him from the vehicle, Carter was visibly injured and bleeding. A rational jury could conclude that under the circumstances, it was not reasonable for the defendant police officers to grab the severely wounded and bleeding Carter by the chest and pull him upright, grab his legs and push them to the floor, forcibly remove him from the vehicle, or detain him while awaiting an ambulance. Nor can Carter's struggles with the police provide justification for further restraint. As noted, a rational jury could find that by the time of the struggle, the police knew that Carter posed no threat, had committed no crime, and was a severely injured victim. Therefore, the fact that he struggled would be of no moment. Accordingly, the court concludes that Cooper has demonstrated facts from which a reasonable factfinder could conclude that the defendant police officers used excessive force in removing Carter from the vehicle and restraining him, in violation of the Fourth Amendment.

4. Denial or Unreasonable Delay in Medical Treatment

Cooper alleges that the defendant police officers denied and/or unreasonably delayed lifesaving medical treatment, depriving Carter of his Fourth and Fourteenth Amendment rights, and "shocking the conscious." Compl. at ¶ 37. The court construes this claim as a Fourth Amendment claim for unreasonable seizure and a Fourteenth Amendment claim for substantive due process. See, e.g., *Lombardi v. Whitman*, 485 F.3d 73, 78-79, 81-82 (2d Cir.2007).

Embedded in this claim are two distinct but related theories of responsibility under the Fourth and Fourteenth Amendments: first, that defendant police officers denied or unreasonably delayed lifesaving medical treatment by detaining Carter at the scene and refusing to let him continue in Wilson's vehicle to the hospital; second, that defendant police officers denied or unreasonably delayed lifesaving medical treatment by delaying calling for an ambulance and by refusing to transport Carter to the hospital in a police cruiser. The court will address these theories sequentially.

a. Detention of Carter at the Scene

The court has already addressed Cooper's allegation that Carter's detention at the scene violated Carter's Fourth Amendment rights. The court will therefore focus this discussion on whether Cooper has made out a Fourteenth Amendment claim.

The Due Process Clause provides, "No State shall ... deprive any person of life, liberty, or property, without due process of law...." *U.S. Const. amend XIV, § 1*. This provision "guarantee[s] more than fair process"; it "cover [s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (internal quotation marks and citations omitted). Substantive due process is violated by certain actions that "shock the conscience." *Id.* at 846-47. Because of the Supreme Court's reluctance to permit the general concept of "substantive due process" to become a font for redressing all harmful government conduct, it has held that:

***12** [w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.

Lewis, 523 U.S. at 842 (citations omitted). In *Graham v. Connor*, considering the interplay of

substantive due process and Fourth Amendment claims, the Supreme Court explained that:

all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach.

Graham, 490 U.S. at 395. The court must therefore first determine the appropriate standard under which to analyze Cooper's claims of denial or unreasonable delay in medical treatment.

Lewis cautions that *Graham's* restrictive rule should not be applied indiscriminately. See 523 U.S. at 843-844. Substantive due process analysis is inappropriate, the court explained, only if the claim is covered by a more specific constitutional provision, such as the Fourth Amendment. *Id.* at 843. In *Lewis*, a police officer undertook a high speed chase of a motorcycle, resulting in the tragic death of the motorcycle passenger when the motorcycle turned sharply left, tipped over, and the patrol car skidded into the passenger. *Id.* at 837. The Court explained that, because a police pursuit in an attempt to seize a person does not amount to a seizure until movement is terminated “through means intentionally applied,” no seizure took place, and therefore the Fourth Amendment did not apply. *Id.* at 843-44 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989)). Accordingly, and because no other amendment applied, the court proceeded to the substantive due process analysis.

By contrast, in the instant case, a seizure did take place. Cooper's claim—that the defendant police officers detained Carter and in doing so, denied or unreasonably delayed Carter's ability to get medical treatment—seeks redress for harm caused by Carter's detention, that is, his seizure. Accordingly, Cooper's claim is “covered” by the Fourth Amendment, and substantive due process analysis is not appropriate. *Id.* at 843-44.

b. Delay in Calling for an Ambulance and Refusal to Transport Carter by Police Cruiser

In addition to his claim of wrongful detention, Cooper alleges that defendant police officers denied or unreasonably delayed lifesaving medical treatment by delaying calling for an ambulance and by refusing to transport Carter to the hospital in a police cruiser, in violation of the Fourth and Fourteenth Amendments. Cooper has not articulated a theory of how the delay in calling for an ambulance and refusal to transport Carter to the hospital in a police cruiser violated his Fourth Amendment right to be free from unreasonable searches and seizures. Accordingly, the court will consider only his Fourteenth Amendment claim.

***13** The court must first determine whether Cooper's Fourteenth Amendment claim is foreclosed by the aforementioned rule that claims covered by an explicit textual source of constitutional protection must be analyzed according to that source, rather than under the more generalized notion of substantive due process. *Lewis*, 523 U.S. at 842; *Graham*, 490 U.S. at 394-95. Even though the alleged delay in calling for an ambulance and refusal to transport Carter also occurred contemporaneously with Carter's seizure, Cooper's Fourteenth Amendment claim of denial or delay does not challenge his detention or the force used in effecting the detention—claims which would be covered by the Fourth Amendment. See *Graham*, 490 U.S. at 394-95. Instead, Cooper's claim seeks redress for actions of the defendant police officers that occurred in the context of the seizure, but were not directly related to it, and for which the Fourth Amendment does not afford redress. The court therefore concludes that Cooper's Fourteenth Amendment claim is not foreclosed by the rule articulated in *Lewis* and *Graham*.

The Due Process Clause of the Fourteenth Amendment protects citizens from “unjustified intrusions on personal security.” *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir.2008) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). However, in the seminal case of *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that, “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.” 489 U.S. 189, 195 (1989). The Court elaborated that the Clause,

generally confer[s] no affirmative right to government aid, even where such aid may be necessary

to secure life, liberty, or property interests of which the government itself may not deprive the individual.... If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.

Id. at 196-97 (internal citations omitted).

The Second Circuit has identified two exceptions to the general rule of *DeShaney*. See *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir.2008). "First, the state or its agents may owe a constitutional obligation to the victim of private violence if the state had a 'special relationship' with the victim." *Id.* (citing *Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2d Cir.1993)). "Second, the state may owe such an obligation if its agents in some way assisted in creating or increasing the danger to the victim." *Id.* (quoting *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir.1993) (internal quotation marks omitted)). The distinction between these two categories of cases "suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant." *Pena v. DePrisco*, 432 F.3d 98, 109 (2d Cir.2005). Even if the defendant police officers' behavior falls within one of these two exceptions, Cooper must also show that the behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Matican*, 524 F.3d at 155 (quoting *Lewis*, 523 U.S. at 848 n. 8).

i. Special Relationship

*14 The "special relationship" exception "grows from the *DeShaney* Court's observation that 'in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.' " *Matican*, 524 F.3d at 155 (quoting *DeShaney*, 489 U.S. at 198). " '[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.' " *Id.* at 156 (quoting *DeShaney*, 489 U.S. at 199-200). While most cases found to qualify for the exception involve incarceration or institutionalization, neither of which was present in this case, the language in the caselaw speaks in terms of "involuntary custody as the linchpin of any special relationship exception." *Id.* For example, the Second Circuit has applied the exception to a parolee who complained that he was placed in an allegedly uninhabitable home, holding that, "a parolee, although not in the state's physical custody, is nonetheless in its legal custody, and his or her freedom of movement, while not as restricted as that of an incarcerated prisoner, is nonetheless somewhat curtailed." *Jacobs v. Ramirez*, 400 F.3d 105, 106 (2d Cir.2005). *DeShaney* itself noted that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200.

Viewing the facts in the light most favorable to the plaintiff, this case clearly fits the "special relationship" exception.^{FN11} Carter was detained by the defendant police officers against his will, and therefore was involuntarily in their custody. While in their custody, he attempted to act on his own behalf to obtain medical care, but was prevented from doing so by the defendant police officers. Therefore, owing to the "special relationship," the defendant police officers had an affirmative duty to protect Carter, notwithstanding the general rule of *DeShaney*.

^{FN11.} Because the case clearly fits the "special relationship" exception, the court need not consider whether it also fits the "state created danger" exception.

ii. Shocks the Conscience

Although the defendant police officers' behavior falls within the "special relationship" exception, they can only be held liable if their actions in delaying calling for an ambulance and refusing to transport Carter in a police cruiser "shock the conscience." See *Lombardi*, 485 F.3d at 81. To shock the conscience, official conduct must be "outrageous and egregious under the circumstances; it must be truly brutal and offensive to human dignity." *Id.* (internal quotation and citation omitted). "In gauging the shock, negligently inflicted harm is categorically beneath the threshold, while conduct

intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 82 (quoting Lewis, 523 U.S. at 849) (internal quotation marks omitted). In between these two extremes lies deliberate indifference, which requires an "exact analysis of the circumstances" because "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another...." *Id.* (quoting Lewis, 523 U.S. at 850) (internal quotation marks omitted). There is no allegation that the officers sought to intentionally injure Carter. Therefore, the court must determine whether the evidence would support a finding by a rational jury that the defendant police officers acted with deliberate indifference.

***15** The Supreme Court has cautioned against finding deliberate indifference when police officers "have obligations that tend to tug against each other," such as in the context of a high-speed chase, because officers "are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" Lewis, 523 U.S. at 853 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)). In such circumstances, "an intermediate level of fault, such as recklessness, is not enough to impose constitutional liability." Pena, 432 F.3d at 113 (quoting Medeiros v. O'Connell, 150 F.3d 164, 170 (2d Cir.1998)). "Lewis made it clear that such emergency situations may-perhaps must-be treated differently than those in which time for reflection is possible." *Id.* On the other hand, "Lewis also indicated that less culpable mental states may more easily shock the conscience when the victim is in state custody." *Id.* at 113 n. 22 (citations omitted). In particular, Lewis noted that recklessness, specifically deliberate indifference to the medical needs of individuals in pretrial detention, is sufficient to satisfy the fault requirement of a due process claim. Lewis, 523 U.S. at 849-50. Still, Lewis grounded its analysis in the fact that in the custody context, there is ordinarily no "substantial countervailing interest [that] excuse[s] the State from making provision for the decent care and protection of those it locks up," *id.* at 851, and explicitly noted that in the fast moving context of a violent prison disturbance, "a much higher standard of fault than deliberate indifference has to be shown for officer liability," *id.* at 852-53.

The facts of instant case fit uneasily among these categories. Militating against a finding of deliberate indifference is the fact that the situation was a fast-moving emergency and required the officers to make quick decisions under pressure, without the benefit of reflection. Militating in favor of such a finding is the fact that Carter was in custody. In addition, the situation is not analogous to a violent prison disturbance or high-speed chase, in which obligations tug against one another. Instead, once the officers had assessed the situation and ascertained that the car contained a victim, which occurred early in the encounter, the officers' obligation became to ensure that Carter received medical care in the most expedient and appropriate fashion.

Cooper alleges that the defendant police officers exhibited deliberate indifference to Carter's medical needs by delaying calling for an ambulance and refusing to transport Carter in a police cruiser to the hospital. The court emphasizes that at this stage of the litigation, it must view the evidence in the light most favorable to the plaintiff. As to the delay in calling for an ambulance, Wilson informed the officers immediately upon being stopped that there was a gunshot victim in the back of her vehicle. Yet before calling for an ambulance, the following events occurred: the officers approached the backseat of Wilson's vehicle with their guns drawn; they yelled at Carter; they waited for another police cruiser to arrive to supply them with gloves before proceeding further; they struggled with Carter in the backseat of the vehicle; and they removed Carter from the vehicle. Only then did they call for an ambulance. The court recognizes that the defendant police officers were acting in a fast-moving situation, without time for deliberation. However, once they knew that the vehicle contained a gunshot victim, and given that they were restraining Carter and preventing Wilson's vehicle from traveling to the hospital, they had the obligation to call for an ambulance as soon as possible. A rational jury could conclude from the evidence that by not immediately calling for an ambulance or permitting the vehicle to continue on its way to the hospital, the defendant police officers were deliberately indifferent to Carter's medical needs, and thus violated his rights to substantive due process.

***16** As for the refusal to transport Carter in a police cruiser, that poses a more difficult question. The officers detained Carter, which interrupted his travel to the hospital. They were aware that the ambulance's response might be delayed because another shooting had taken place that evening. On

the other hand, they also knew that an ambulance could provide better medical care en route to the hospital than the officers were capable of providing. They also believed, whether correctly or not, that Hartford Police Department policy or practice always provided for the transport of injured persons in ambulances. Though in the instant case the refusal to transport by cruiser may have had mortal consequences, in the typical case, transport by ambulance may be more desirable. Finally, the officers acted under pressure and without the benefit of reflection. Though in hindsight a cruiser transport in the instant case may have been more desirable, the court concludes that, viewing the facts in the light most favorable to the plaintiff, as a matter of law, the defendant police officers' refusal to transport Carter in their cruisers did not exhibit deliberate indifference to Carter's medical needs or shock the conscience such that it would be appropriate to impose liability on the officers for a substantive due process violation.

5. Qualified Immunity: Were Rights Clearly Established?

The court has concluded, viewing the facts in the light most favorable to the plaintiff, that a rational trier of fact could conclude that defendant police officers violated Carter's constitutional rights. Specifically, a rational trier of fact could conclude that defendant police officers violated Carter's Fourth Amendment right to be free from unreasonable searches and seizures with regard to the vehicle stop, his prolonged detention, his removal from the vehicle, and use of excessive force in removal, and violated his Fourteenth Amendment right to substantive due process with regard to the delay in calling for an ambulance.

The court must now determine whether those rights were clearly established on May 14, 2005. To make that determination, the court inquires "whether it would be clear *to a reasonable officer* that his conduct was unlawful in the situation he confronted." Walczyk, 496 F.3d at 154 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)) (emphasis in Walczyk). "If the conduct did not violate a clearly established constitutional right, or if it was objectively reasonable for the officer to believe that his conduct did not violate such a right, then the officer is protected by qualified immunity." Gilles, 511 F.3d at 244 (citations omitted). The Second Circuit has identified the factors that courts must consider:

(1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

**17 Pena v. DePrisco*, 432 F.3d 98, 115 (2d Cir.2005) (citations omitted). The court must separately consider each alleged rights violation.

a. Initial Vehicle Stop

The court has concluded that a rational jury, viewing the facts in the light most favorable to the plaintiff, could conclude that the police lacked reasonable suspicion to conduct the initial investigatory stop of Wilson's vehicle. However, even if the totality of circumstances were insufficient to give rise to reasonable suspicion, defendant police officers had an objectively reasonable belief that the stop of the vehicle was justified, and their actions are therefore protected by qualified immunity. See Holeman, 425 F.3d at 191 ("Even if the totality of facts were insufficient to satisfy probable cause or reasonable suspicion, Officer Williams' belief that they were was objectively reasonable, and therefore protected by qualified immunity."). Defendant police officers were in a unit responding to a shooting. While en route to the shooting site, they encountered a vehicle, traveling quickly, that they believed to match a vehicle that had been put out over the radio as possibly containing a suspect or victim. At the time, the facts of the shooting were largely unknown to the officers, and they were acting under the time pressure of a rapidly unfolding situation. They had to immediately determine whether to stop the vehicle. Although they encountered the vehicle almost one mile away from the shooting scene, and did not know the license plate number, make, or description of the occupants of the vehicle that Lollar had seen, under the facts and circumstances, their belief that it was the same vehicle, based on the fact that the vehicle was quickly traveling southbound on a parallel street one block west of the street where the shooting took place, was objectively reasonable. Therefore, even if hindsight reveals that the totality of the information before the officers did not give rise to reasonable suspicion, under the pressured circumstances, the officers had an objectively reasonable belief that they had

justification to stop the vehicle. Accordingly, the defendant police officers are entitled to qualified immunity on the question of whether the vehicle stop was lawful.

b. Prolonged Detention/False Arrest

Carter's right to be free from arrest in the absence of probable cause, and to avoid prolonged investigatory detention without cause, was clearly established on May 14, 2005. The Supreme Court had long held that an investigatory detention must be temporary and last no longer than necessary, and the Second Circuit had identified the relevant factors from which courts determine whether an investigatory stop is sufficiently intrusive to ripen into a de facto arrest. See Royer, 460 U.S. at 500; Vargas, 369 F.3d at 101. A reasonable officer would have understood on May 14, 2005, that in the absence of probable cause or reasonable suspicion, he could not restrain Carter past the point necessary to ascertain that he was an unarmed shooting victim. Furthermore, because Carter made clear his desire to leave the officers' custody and go to the hospital either in Wilson's vehicle or on his own power, Carter's prolonged detention is distinguishable from a situation where a citizen in need of medical assistance, not initially subject to investigative detention or arrest, may come into physical contact with the police as they attempt to deliver such assistance. Defendant police officers are therefore not entitled to qualified immunity on the claims of prolonged detention and false arrest.

c. Removal from the Vehicle

***18** While the court has concluded that a rational jury, viewing the facts in the light most favorable to the plaintiff, could conclude that Carter's removal from the vehicle violated his Fourth Amendment rights, the court concludes that this right was not clearly established and thus the officers are entitled to qualified immunity. In *Maryland v. Wilson*, the Supreme Court held that an officer who lawfully makes a traffic stop may order passengers to exit the car pending the completion of the stop. 519 U.S. at 414-15. The court has found that the officers had an objectively reasonable belief that the stop was lawful, which would have authorized the police officers to order Carter to exit the vehicle at the time of the stop. While the court concludes that the defendant police officers did not have the right to remove Carter from the vehicle once they had realized that no reasonable suspicion existed to make the stop, that there was no basis to suspect any vehicle occupant was armed or dangerous or had been involved in criminal activity, and that Carter posed no threat, the court finds that a reasonable defendant official may not have understood the removal to be unlawful. Further, the court concludes that the contours of the law surrounding the Fourth Amendment interests of vehicle passengers, which has been in flux since the late 1990s, was not developed with reasonable specificity on May 14, 2005, such that a reasonable defendant official would have understood Carter's removal to be unlawful. Therefore, the defendant police officers are entitled to qualified immunity on Carter's claims stemming from his removal from the vehicle.

d. Excessive Force in Removal

Carter's right to not have the officers use excessive force in removing him from the vehicle was clearly established on May 14, 2005. In *Graham v. Connor*, the Supreme Court set out the standard by which claims by a non-incarcerated individual that law enforcement officials used excessive force during a seizure are to be judged. 490 U.S. 386. Courts are directed to look at the severity of the crime at issue, whether the suspect poses an immediate threat to officer safety, and whether he is actively resisting arrest or attempting to evade arrest. Id. at 396. The determination is case specific. In Carter's case, the facts and circumstances all militate against the use of physical coercion. It would be clear to a reasonable officer that grabbing a severely wounded and bleeding man by the chest and legs, and physically restraining him once he was outside the vehicle, after the officer had already determined that there was no justification to arrest Carter, he posed no threat, and was a severely injured victim, would be unlawful. Defendant police officers are therefore not entitled to qualified immunity on the claims of excessive force.

e. Delay in Calling for an Ambulance

Although the question is a close one, the court finds that Carter's Fourteenth Amendment substantive due process right to have the officers not delay in calling an ambulance was clearly established on May 14, 2005. It would have been clear to a reasonable officer on that date that, because he was detaining Carter, a severely injured victim, and limiting Carter's ability to act on his own behalf by preventing his travel to the hospital in Wilson's vehicle or on his own power, the officer had an affirmative duty to assume responsibility for Carter's safety and general well-being. *Jacobs v.*

Ramirez, which the Second Circuit decided a few months before the events in this case, made clear that the affirmative duty to protect individuals in custody applied not only to incarcerated or institutionalized individuals, but to any individual in physical or legal custody. 400 F.3d at 106. Further, it would be clear to a reasonable officer that it would not be lawful to detain a severely injured gunshot victim just over a mile from the hospital without making immediate provision for his medical needs. A reasonable officer would understand it to be deliberately indifferent—that is, unlawful—to delay obtaining medical care in this situation by not calling for an ambulance immediately upon hearing that a gunshot victim was present in the vehicle, rather than delaying until they had secured the back seat, obtained gloves, and removed Carter from the vehicle. ^{FN12} Defendant police officers are therefore not entitled to qualified immunity with regard to the substantive due process claims.

^{FN12}. The court recognizes that the testimony as to when the officers called an ambulance is in conflict, and that at trial, the jury may find that the officers in fact called an ambulance within a reasonable period of time. However, at summary judgment, the court must view the facts in the light most favorable to the plaintiff.

B. Count One: Claims Against City of Hartford

*19 Cooper alleges that the City of Hartford had in effect de facto policies, practices, and customs that exhibited deliberate indifference to the safety and lives of the citizens and residents of Hartford, and that they caused the defendant police officers to engage in unconstitutional conduct. In his Complaint, Cooper alleges that a wide range of de facto City policies, practices, and customs are unconstitutional. He also claims that the City is liable for the failure to investigate allegations of misconduct. However, in his Opposition to defendants' Motion, Cooper limits his claims. First, he seeks to make out a failure to train claim, limiting that claim to three areas: failure to train defendant police officers in determining reasonable suspicion and probable cause, the use of reasonable force, and facilitating lifesaving medical treatment for injured persons within its custody. ^{FN13} See Pl.'s Opp'n at 47. Second, Cooper alleges that the City of Hartford had a de facto policy or custom to not transport gravely injured persons in a police cruiser for medical treatment, and contends that this policy or custom amounts to a deliberate indifference to medical needs. *Id.* at 49.

^{FN13}. In addition, as noted *supra*, Cooper's Complaint states claims against Chief Patrick Harnett, which he abandons in his Opposition. See Opp'n at 46 n. 5.

1. Failure to Train

The court will first address whether plaintiff has demonstrated, as he asserts, that “[g]enuine factual issues exist” as to the City’s liability for failure to train in the three identified areas.

Municipalities are liable for the unconstitutional acts of municipal employees only when the municipality itself can be said to have committed the misdeed; that is, when the misdeed results from the execution of a government policy or custom. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978). “A city’s failure to train its subordinates satisfies the policy or custom requirement only where the need to act is so obvious, and the inadequacy of current practices so likely to result in a deprivation of federal rights, that the municipality ... can be found deliberately indifferent to the need.” *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir.2007) (citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). More specifically, “the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” *Harris*, 489 U.S. at 388.

In *Walker v. City of New York*, the Second Circuit established the circumstances under which a failure to act amounts to deliberate indifference: (1) the City knows to a moral certainty that its employees will confront a given situation; (2) the situation presents the employee with a difficult choice of the type that training or supervision would make less difficult, or there is a history of employees mishandling the situation; and (3) the wrong choice by the city employee would frequently cause the deprivation of a citizen’s constitutional rights. 974 F.2d 293, 297-98 (2d Cir.1992). In a

failure to train case, a plaintiff ordinarily establishes deliberate indifference by showing "that the officials consciously disregarded a risk of future violations of clearly established constitutional rights by badly trained employees." Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 127 n. 8 (2d Cir.2004) (citing Harris, 489 U.S. at 389-90).

***20** In addition to establishing that the alleged failure to train constituted deliberate indifference, plaintiffs must also prove causation. That is, a plaintiff must identify a specific deficiency in the city's training program and "establish that that deficiency is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation." *Id.* at 129 (quoting Harris, 489 U.S. at 391). Demonstrating "negligent administration of a sound program," or that one or more officers negligently or intentionally disregarded otherwise appropriate training, does not suffice. *Id.* at 129-30.

To survive summary judgment on a failure to train claim, a plaintiff must proffer "evidence as to the city's training program and the way in which that program contributed to the violation." *Id.* at 127 n. 8; see *id.* at 130 n. 10. Ordinarily, a plaintiff should introduce evidence of "how the training was conducted, how better or different training could have prevented the challenged conduct, or how 'a hypothetically well-trained officer would have acted' " differently under the circumstances. *Id.* at 130. Because the focus of the analysis in a failure to train claim is on the training itself, "[t]he factfinder's inferences of inadequate training and causation must be based on more than the mere fact that the misconduct occurred in the first place." *Id.* (citing Harris, 489 U.S. at 390-92).

Even assuming that he could establish deliberate indifference, Cooper has not introduced evidence as to the details of the training provided to officers or how better or different training could have prevented the challenged conduct. To establish a lack of training, Cooper points to deposition testimony and interrogatories, which he contends would support a jury finding that the police officers received no training at all regarding how to handle injured persons in need of lifesaving medical treatment. Cooper also contends that the defendant police officers received no training or training materials whatsoever following their education at the police academy. In the deposition testimony to which Cooper cites, Hopkins was asked if he had received any training or was otherwise aware of written protocols "as to the priority that medical treatment must take when a police officer is presented with someone in a potentially life threatening condition?" Hopkins Dep. at 45. Hopkins replied that he did not recall. *Id.* Cooper also cites to interrogatories. In response to an interrogatory about training generally received for the defendant's "current [position]," Hopkins responded that he had received "on the job training and in service training" since his time at the police academy. St. John referred to "mandatory service training," Miele responded that he was retired so the question was not applicable, and Otero also referenced "mandatory in-service training." Pl.'s Ex. 10 at ¶ 5; Pl.'s Ex. 11 at ¶ 5; Pl.'s Ex. 12 at ¶ 5; Pl.'s Ex. 13 at ¶ 5. In response to an interrogatory about documents "concerning the law of making investigatory stops, detaining, frisking, searching, administering and providing first aid, and administering and providing emergency medicine," Hopkins responded, "None in my possession," and the other three defendant police officers responded "Unknown." Pl.'s Ex. 10 at ¶ 19; Pl.'s Ex. 11 at ¶ 5; Pl.'s Ex. 12 at ¶ 5; Pl.'s Ex. 13 at ¶ 5. Finally, Cooper also contends that, because defendants have failed to establish the fact that training is adequate, that a jury could conclude it is inadequate.

***21** The court disagrees with Cooper that a rational jury, viewing the facts in the light most favorable to the plaintiff, could conclude from the evidence in the record that the plaintiff has proven a failure to train claim. The deposition questions and answers, and interrogatory questions and answers to which Cooper points, are insufficient to create an issue of fact. Each of the defendant police officers references having received mandatory in-service training. There is no evidence in the record as to the contents of the mandatory in-service training to which each defendant referred, how training was conducted, or how better or different training might have prevented the conduct at issue in this case. Cooper may not shift the burden to the defendants to establish the adequacy of training: the burden of persuasion lies on Cooper as to the ultimate issue. In order to survive summary judgment, he must proffer evidence from which a rational jury could conclude that he has proven a failure to train claim. Because the evidence in the record is not sufficient to meet such a burden, the court grants defendants' Motion for Summary Judgment as to Cooper's failure to train claim.

2. Transportation of Gravely Injured Individuals by Cruiser

The court will next address Cooper's claim that the City of Hartford had a de facto policy or custom not to transport gravely injured persons in a police cruiser for medical treatment, and that this policy or custom amounts to a deliberate indifference to citizens' medical needs. Municipalities can be held liable under section 1983 when a government policy or custom deprives a plaintiff of his constitutional right. Monell, 436 U.S. at 690-91.

Cooper has set forth sufficient evidence to create an issue of fact as to whether the City had a de facto policy or custom to not transport gravely injured persons in a police cruiser for medical treatment. Sergeant Miele indicated in his testimony that the Department policy was to call for an ambulance to transport injured victims to the hospital, rather than to transport them via police cruiser. Miele Dep. at 41-42; see also St. John Dep. at 22-26.

Cooper has not articulated, however, the ways in which this policy or custom amounts to a deliberate indifference to citizens' medical needs. Even if the effects of the officers' refusal to transport Carter in their cruiser may have contributed to Carter's damages, that does not mean that the general policy or custom of transporting injured citizens in ambulances rather than police cruisers amounts to deliberate indifference to citizens' medical needs. It may be reasonable for the City to decide that transport by ambulance is better in the typical case, because the ambulances can provide better medical care en route to the hospital than officers are capable of providing. Because Cooper has not come forward with evidence suggesting that the policy generally results in unconstitutional effects or is itself unconstitutional, Cooper has not created an issue of fact as to his claim that the City has an unconstitutional policy or custom of refusing to transport individuals by police cruiser. Accordingly, the court grants defendants' Motion for Summary Judgment as to this claim.

C. *State Law Counts* 1. Count Two: State Constitutional Claims

*22 In Count Two, Cooper seeks damages pursuant to Article first, sections 7 and 9 of the Connecticut Constitution. Section 7 mirrors the Fourth Amendment's protections against unreasonable searches and seizures, but provides greater protection in certain instances. State v. Davis, 283 Conn. 280, 305-06 (2007). Section 9 provides that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law." Cooper asserts a claim against defendant police officers for infringing his right to be free from unreasonable searches and seizures, false arrest, and excessive force. He also asserts a claim against the City ^{FN14} for unconstitutional policies, practices, and customs.

^{FN14}. As previously noted, Cooper abandons his claims against Harnett.

The Connecticut courts' substantive interpretations of these state constitutional provisions have been similar, but not identical to, interpretations of the Fourth Amendment rendered by federal courts. See State v. Burroughs, 288 Conn. 836, 844-47 & n. 6-7 (2008). For the purposes of the allegations in this case, the parties have not called the court's attention to any ways in which substantive differences in the provisions would affect the outcome of this case, and the court is not aware of any. Accordingly, the court adopts its analysis already employed in analyzing the federal constitutional claims and concludes that Cooper survives summary judgment on his state constitutional claims to the same extent as he survives on his federal claims. However, because qualified immunity is not available for state constitutional claims, the court conducts a separate analysis of Connecticut immunities, *infra*. See Fleming v. City of Bridgeport, 284 Conn. 502, 531 (2007) (applying state law governmental immunity to claims under the Connecticut Constitution); Mulligan v. Rioux, 229 Conn. 716, 728-30 (1994) (discussing distinctions between qualified immunity in section 1983 claims and state law immunity).

2. Count Three: Wrongful Death

In Count Three, Cooper seeks damages under Connecticut's wrongful death statute, Conn. Gen.Stat. § 52-555. The wrongful death statute permits recovery by a decedent's estate "from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses...." Conn. Gen.Stat. § 52-555 (a). To recover,

The plaintiff must prove not only a violation of a standard of care as a wrongful act, but also a causal relationship between the injury and the resulting death. A causal relation between the defendant's wrongful conduct and the plaintiff's injuries is a fundamental element without which a plaintiff has no case. If the chain of causation of the damage, when traced from the beginning to the end, includes an act or omission which, even if wrongful or negligent, is or becomes of no consequence in the results or so trivial as to be a mere incident of the operating cause, it is not such a factor as will impose liability for those results.

***23** Ward v. Greene, 267 Conn. 539, 546-47 (2004) (quoting Grody v. Tulin, 170 Conn. 443, 448-49 (1976)).

Defendant police officers seek summary judgment on Cooper's wrongful death claim on the grounds that the defendant police officers did not cause Carter's death and that they are immune from Cooper's claims. Because these objections are shared with the other counts, the court will address them separately, *infra*.

Defendant City of Hartford seeks summary judgment on the above grounds and also on the ground that Carter's death did not result from wrongful policies, practices, or customs for which the City can be held responsible. The court does not construe plaintiff's complaint to raise a wrongful death claim in Count Three based upon policies, practices, or customs. See Compl. at Count Three. Instead, plaintiff alleges that the defendant police officers engaged in negligent acts and omissions in the scope of their employment, and caused pre-death damages as well as death, for which Cooper seeks to hold the City responsible. *Id.* Under Connecticut law, a municipality, subject to certain immunities, can be held liable for the negligent act or omission of a municipal officer acting within the scope of his or her employment. Conn. Gen.Stat. § 52-557n(a)(1). There is no dispute that the defendant police officers were acting in the scope of their employment at the time of the alleged incident. Therefore, whether Cooper can hold the municipality liable will turn on whether the defendants caused Carter's death, and whether immunity applies. The court will address causation and immunities separately, *infra*.

Finally, the court must also address another objection raised by defendants: that the wrongful death statute is the sole basis upon which an action that includes a person's death as an element of damages may be brought. The court separately addresses this objection as to the state and federal claims.

a. State law claims

The Connecticut Supreme Court has explained that "[t]he wrongful death statute; General Statutes § 52-555; is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought." Lynn v. Haybuster Mfg., Inc., 226 Conn. 282, 295 (1993). This rule requires that the executor bring claims on behalf of the decedent pursuant to the wrongful death statute, and bars other interested parties from bringing claims except as authorized by statute. For example, in Ladd v. Douglas Trucking Co., the Connecticut Supreme Court held that a spouse's claim for postmortem loss of consortium was foreclosed, because it was not permitted at common law and the wrongful death statute did not permit such claims. 203 Conn. 187, 191, 196-97 (1987), *superseded by statute*, Public Acts 1989, No. 89-148, Conn. Gen.Stat. § 52-555a, *as recognized in* Lynn, 226 Conn. at 296 n. 12. *Ladd* explained, however, that the wrongful death statute was enacted to allow "the estate of the victim to recover all of the damages resulting from a death," including for "destruction of his earning capacity," and "for the termination of the decedent's ability to carry on nonpecuniary activities of life." ^{FN15} *Id.* at 196-97. The statute's focus, the court explained, was "upon the value of the decedent's life from his viewpoint" rather than "that of his family," for which reason the court decided to leave to the legislature the question of whether to recognize a right to recovery in the spouse. *Id.*

^{FN15} Compensation for "conscious pain and suffering" is also permitted under the wrongful death statute. See Sanderson v. Steve Snyder Enters., Inc., 196 Conn. 134, 149 n. 12 (1985).

*24 In this case, only Carter's executor, Cooper, has sought to bring claims related to Carter's death and its consequences. Defendants contend that the rule that the wrongful death statute is the "sole basis" upon which such actions may be brought bars Cooper's alternative theories of liability articulated in Counts One and Two. The court disagrees. While the plain language of the rule is not a model of clarity, the Connecticut Supreme Court's explication of the rule in *Ladd* makes clear that the rule's purpose is to channel such claims within the strictures of the wrongful death statute's requirements, not to otherwise limit the ability of a plaintiff to state alternative theories of recovery. See 203 Conn. 187. That is, the rule does not prevent an executor "from advancing alternative theories of recovery, or causes of action, pursuant to the wrongful death statute." *Monterio v. Crescent Manor, LLC*, No. CV030181589S, 2004 WL 1245906, at *2 (Conn.Super.Ct. May 21, 2004) (quoting *Hebert v. Frontier of Ne. Conn., Inc.*, No. CV010065465, 2004 WL 304277, at *2 (Conn.Super.Ct. Jan. 29, 2004)); but see *Torres v. Am. Med. Response of Conn., Inc.*, No. CV000802360, 2001 WL 1187155 (Conn.Super.Ct. Sept. 6, 2001) ("Clearly, however, the statute was intended to bar plaintiffs from seeking recovery for death as damages under the wrongful death statute in one count and under an alternative theory of liability in a separate count that relies on the same conduct.").

Finally, while Cooper does not explicitly articulate that each state law cause of action is brought under the wrongful death statute, the court construes the Complaint as raising causes of action in Counts Two and Four pursuant to the wrongful death statute, and Count Three as raising a negligence claim pursuant to the wrongful death statute.

b. Federal Claims

Defendants suggest that section 1983 claims should also be subject to the limitations of the wrongful death statute. Mot. at 32-33 (referencing Count One). The Supreme Court has held that, pursuant to 42 U.S.C. § 1988, the survivorship of section 1983 claims is generally a question of state law, unless state law is generally inhospitable to the survival of section 1983 claims. *Robertson v. Wegmann*, 436 U.S. 584, 590, 594 (1978). However, in *Robertson*, the Supreme Court declined to address the related question at issue in this case—"whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Id.* at 594. The Second Circuit subsequently held that:

[L]imitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the decedent's death.... To whatever extent section 1988 makes state law applicable to section 1983 actions, it does not require deference to a survival statute that would bar or limit the remedies available under section 1983 for unconstitutional conduct that causes death.

*25 *McFadden v. Sanchez*, 710 F.2d 907, 811 (2d Cir.1983). Further, in the case of *Dodd v. City of Norwich*, 827 F.2d 1 (2d Cir.1987), the Second Circuit dismissed a wrongful death claim against one defendant while permitting a section 1983 claim to potentially survive against that defendant.

This case, which seeks to redress the denial of Carter's constitutional rights resulting in his death, is on all fours with *McFadden*. The court therefore concludes that Connecticut's wrongful death statute does not apply to limit the theories of liability, bases of recovery, or remedies otherwise available to Cooper on his section 1983 claims in Count One.

3. Count Four: Negligent Infliction of Emotional Distress

To prevail on a claim of negligent infliction of emotional distress under Connecticut law, a plaintiff must show that: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 444 (2003).

Cooper has set forth issues of fact as to each of these elements. In particular, defendant police officers' forced restraint and detention of Carter as he sought to escape the scene to obtain medical

care created an unreasonable risk of causing Carter emotional distress. Carter's struggle to escape made clear that he wished to continue on his way to the hospital. It was foreseeable to the officers that the forced restraint of a severely-injured man when he is only 1.3 miles away from the modern medical technology that could save his life might cause severe emotional distress. Accordingly, defendants are not entitled to summary judgment on this claim.

4. Count Seven: Indemnification

Connecticut law provides that municipalities must indemnify employees when they are found liable for an infringement of civil rights or physical damage to a person, provided that the employee was acting in the performance of his duties and the scope of employment at the time of the challenged occurrence, and the damage did not result from willful or wanton acts. Conn. Gen.Stat. § 7-465; Myers v. City of Hartford, 84 Conn.App. 395, 399, 400 (2004). Defendants seek summary judgment on the indemnification count solely on the ground that there are no genuine issues of material fact with regard to plaintiff's underlying claims that defendant police officers are liable. Defs.' Mem. at 39. The court has concluded that there are issues of fact relating to the defendant police officers' liability on several of plaintiffs' claims. Therefore, as to the underlying claims on which the court has found an issue of fact, defendant City is not entitled to summary judgment on Cooper's claims for indemnification; defendant City is entitled to summary judgment on Cooper's claims for indemnification as to all other underlying claims.

D. State Law Counts-Immunity

***26** The court will now consider whether the defendant police officers and the City are entitled to immunity on Cooper's state law claims.

1. Defendant Police Officers

Connecticut law provides that:

[A] municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. In contrast, ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion.

Mulligan v. Rioux, 229 Conn. 716, 727 (1994) (citations and internal quotation marks omitted). The defendants' police officers' actions clearly fall into the category of discretionary governmental acts, for which defendant police officers receive immunity unless the case falls into one of three exceptions:

[F]irst, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ... second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws ... and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.

Id. at 728 (citations and internal quotation marks omitted). Cooper has not suggested that either the second or third exception applies, but argues in favor of the applicability of the first exception.^{FN16} Defendants assert the applicability of governmental immunity but do not address the exceptions.

^{FN16} Defendants also contend that the court's determination of immunity turns on whether the duty was a public or private duty. However, the court need not make this determination, because if the exception applies, then an action may be brought against a municipal employee regardless of whether the duty allegedly breached was public or private. See Shore v. Town of Stonington, 187 Conn. 147, 153 (1982) ("Policy considerations have also resulted in the establishment of certain exceptions which provide that an individual cause of action may be brought against an official for breach of duty without regard to whether the duty is technically a public or private one."); see also Gordon v. Bridgeport Housing Auth., 208 Conn. 161, 166-67 (1988) ("The *Shore* opinion outlined limited exceptions to the rule that officials who undertake discretionary actions

are immune from civil liability.... One exception is when 'it would be apparent to the public officer that his failure to act would be likely to subject an identifiable person to imminent harm.' " (quoting Shore, 187 Conn. at 153)).

"By its own terms, [the first exception] requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm." Doe v. Petersen, 279 Conn. 607, 616 (2006). The first two elements are "evaluated with reference to each other," such that "[a]n allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm," and "the alleged imminent harm must be imminent in terms of its impact on a specific identifiable person. Id. at 620-21. To abrogate immunity, it is not sufficient that the challenged actions are "likely to result in *some* harm to *some* person"; the circumstances must be specific such that the behavior and its effects are closely linked. See Seri v. Town of Newtown, 573 F.Supp.2d 661, 675 (D.Conn.2008).

At the time the officers stopped the vehicle, it was not apparent to the officers that their conduct was likely to subject any identifiable victim to imminent harm. Therefore, the officers are entitled to immunity on the allegation in Count Two that they had no reasonable suspicion to stop the vehicle.

The requirements to abrogate immunity under this exception have been met as to Cooper's remaining claims: that there was no justification to remove him from the vehicle, that the officers used excessive force in removing him from the vehicle, that he was subject to prolonged detention, that there was a delay in calling for an ambulance, that the defendant police officers acted negligently in causing Carter's death, and that they negligently inflicted emotional distress on Carter. By the time the defendant police officers began to remove Carter from the vehicle, Carter was in the custody of the defendant police officers, who were aware that he had been shot multiple times and was severely bleeding. Therefore, he was an identifiable victim, subject to imminent harm of further degradation of his condition and eventual death if he was not provided prompt medical care. It was also apparent that forcibly removing Carter, a severely injured man, from the vehicle could subject him to imminent harm. Cooper has introduced evidence that the officers detained him, which prevented him from going to the hospital in Wilson's vehicle, and delayed in calling for an ambulance. It would be apparent to the officers that these actions would delay his access to necessary medical care, therefore subjecting Carter to imminent harm. This is not a case challenging a broad series of actions with far-reaching consequences for multiple persons over an extended period of time. Rather, the alleged harm impacted an identifiable victim whose freedom of action was restrained by the defendant police officers, occurring "within a framework limited in duration, place and condition," Tryon v. North Branford, 58 Conn.App. 702, 710 (2000). Accordingly, defendant police officers are not entitled to summary judgment on the question of immunity as to these claims.

1. City

*27 Under Connecticut law, a municipality can be held liable for the negligent act or omission of a municipal officer acting within the scope of his or her employment. Conn. Gen.Stat. § 52-557n(a)(1). "General Statutes § 52-557n(a)(2)(B), however, explicitly shields a municipality from liability for damages to person or property caused by the 'negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.' " Petersen, 279 Conn. at 614 (quoting Conn. Gen.Stat. § 52-557n(a)(2)(B)). As the court has already noted, the defendants' police officers' actions clearly fall into the category of discretionary governmental acts, so the municipality is immune for the acts or omissions of the officers unless an exception applies.

In 2006, in Doe v. Petersen, the Connecticut Supreme Court applied the identifiable person/imminent harm exception to a municipality. 279 Conn. at 609, 614-16. While the earlier case of Pane v. Danbury, 267 Conn. 669, 677-78 n. 9 (2004), had explained in a footnote that the exception did not apply to municipalities, this court will follow the later case of Doe v. Petersen in concluding that the imminent harm exception applies to municipalities. See Petersen, 279 Conn. at 609, 614-16; see also Seri, 573 F.Supp.2d at 672-73 ("Since the Petersen decision, the prevailing opinion of the lower courts in Connecticut appears to be in favor of applying the identifiable victim/imminent harm exception to municipal immunity, too." (citations omitted)); Susman v. Town

of East Haven, No. CV020468497, 2007 WL 1532713, at *5 (Conn.Super.Ct. May 9, 2007) (concluding that the "imminent harm exception" applies to municipalities).

The court has already concluded that the exception applies to the actions of the defendant police officers in this case. Because the officers were acting within the scope of their employment, the analysis as to whether the municipality is entitled to the exception for Cooper's wrongful death claims in Count Three is identical to the analysis already conducted as to the immunity of the defendant police officers. Accordingly, the City is not entitled to summary judgment on the question of immunity as to Cooper's wrongful death claim.

E. Causation

In order to prevail in his claims against the defendant police officers, Cooper must demonstrate that Carter's death resulted from their actions. That is, he must establish that the defendant police officers' actions were a cause in fact and proximate cause of Carter's death. Cause in fact, also known as "but-for cause," asks whether the injury would have occurred were it not for the defendant's conduct. Proximate cause asks whether the defendants can legally be held liable for the results of their conduct.

Defendants in section 1983 actions, like tort defendants, are responsible for the " 'natural consequences of their actions.' " *Higazy v. Templeton*, 505 F.3d 161, 175 (2d Cir.2007) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). "[I]n all § 1983 cases, the plaintiff must prove that the defendant's action was a proximate cause of the plaintiff's injury." *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir.1998) (citations omitted). Although a lack of evidence of proximate causation may lead to the granting of summary judgment, the Second Circuit has emphasized that "foreseeability and causation ... are issues generally and more suitably entrusted to fact finder adjudication." *Higazy*, 505 F.3d at 175 (citations and internal quotation marks omitted).

***28** Under Connecticut law, to determine proximate cause, the court inquires into "whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries." *Paige v. Saint Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 25 (1999) (citations and internal quotation marks omitted). The court must inquire into "whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, 287 Conn. 208, 218 (2008) (citations and internal quotation marks omitted). As an early case explained,

Whether an injury following a negligent act is caused by this act depends upon whether it is traceable in causal relation to the tortious act. Or, expressed in another form, was this act a substantial factor in causing this later injury? There may be several injuries resulting from the negligent act which are not necessarily simultaneous, but the act to have such a continuing effect must be a substantial factor in producing each injury. Whether they are concurrent, successive, or intervening is of no consequence in determining the causal relation of the injury to the tortious act; all that is of consequence is: Were they substantial factors in producing the injury?

Mahoney v. Beatman, 110 Conn. 184, 197-98 (1929). To establish proximate causation, Cooper need not prove that the defendant police officers' actions were the sole cause of Carter's death; instead, he need only demonstrate that their actions were a substantial factor in producing Carter's death.

Cooper has created an issue of fact as to whether the defendant police officers were a cause in fact of Carter's death. Cooper has submitted an expert report of a physician, Dr. Peter Paganussi, in which Dr. Paganussi opines that, "Mr. Carter was deprived of an opportunity for successful treatment by the Defendants' actions in causing delay in his treatment.... This delay necessitated an emergency thoracotomy and dramatically increased the mortality in this situation." Paganussi Rep. This report is sufficient to create an issue of fact as to factual causation-that is, whether Carter would have died had the defendant police officers not acted.

As to proximate causation, the court first turns to the question of whether the "lost chance" doctrine applies. The defendant contends, at least as to the state law claims, that the "loss chance of recovery doctrine" sets forth the requirements of establishing causation, and that plaintiff cannot

meet these requirements because he has not provided evidence that Carter had a 51 percent or greater chance of survival. The plaintiff counters that the doctrine is only applicable in medical malpractice cases, and that causation should be determined according by the court inquiring whether the defendants' acts or omissions were a substantial factor in bringing about Carter's death.

Connecticut courts apply the "lost chance" or "lost opportunity" doctrine in medical malpractice cases where a plaintiff claims that a physician's negligence decreased the plaintiff's chance of survival or successful treatment. See *Boone v. William W. Backus Hosp.*, 272 Conn. 551, 573-74 (2005). In such a situation, the doctrine limits recovery to cases where the plaintiff can show that prior to the physician's alleged negligence, the plaintiff had a chance of survival of at least 51 percent, and that the resulting decreased chance more likely than not resulted from the physician's negligence. *Id.*

***29** For several reasons, the court concludes that the Connecticut Supreme Court would not apply the loss of chance doctrine's causation formula to limit the ability of Cooper to recover on the facts of this case, and would instead apply the "substantial factor" test. First, the court is not persuaded that the doctrine should be extended beyond the peculiar circumstances of medical malpractice. As the Massachusetts Supreme Judicial Court recently pointed out in adopting the loss of chance doctrine for the first time in a medical malpractice wrongful death action, "[p]ermitt[ing] recovery for loss of chance is particularly appropriate in the area of medical negligence." *Matsuyama v. Birnbaum*, 452 Mass. 1, 3 (2008); see also Restatement (Third) of Torts: Liability for Physical Harm § 26 cmt. n (Proposed Final Draft No. 1, 2005) ("To date, the courts that have accepted lost opportunity as cognizable harm have almost universally limited its recognition to medical-malpractice cases."). Second, and more fundamentally, the doctrine's purpose is to provide an alternate theory of recovery in medical malpractice claims where ordinary theories of recovery would not be available; it does not serve as a limit on the ability of an aggrieved plaintiff to recover under ordinary causation principles. See *id.*; see also *Borkowski v. Sacheti*, 43 Conn.App. 294, 301-08 (1996) (discussing the various versions of the doctrine and the relaxed theory of causation that it embodies). Therefore, since plaintiff specifically disclaims reliance on the doctrine, the court will not consider it further.

The court must therefore determine whether Cooper has created an issue of fact as to whether Carter's death was a natural consequence of the defendant police officers' actions (federal claims) and whether the defendant police officers' actions were a substantial factor in Carter's death (state claims). As discussed, Dr. Paganussi has opined that "Mr. Carter was deprived of an opportunity for successful treatment by the Defendants' actions in causing delay in his treatment.... This delay necessitated an emergency thoracotomy and dramatically increased the mortality in this situation." Paganussi Rep. Carter's medical records suggest that his condition rapidly deteriorated over a short period of time upon his reaching the hospital, and Wilson's Affidavit states that Carter became less lucid during his detention by the defendant police officers. Further, because the defendant police officers were aware that Carter had been shot and was severely injured, it was foreseeable to them that restraining him would delay his ability to access medical care and could result in his death. The court concludes that a rational jury could conclude from this evidence that Carter's death was a natural and foreseeable consequence of the officers' actions in detaining Carter, and that the officers' actions, and the resulting delay in Carter's ability to access medical care, were a substantial factor in causing Carter's death. Therefore, Cooper has created an issue of fact as to proximate cause on both federal and state claims.

IV. CONCLUSION

***30** For the foregoing reasons, defendants' Joint Motion for Summary Judgment (Doc. No. 50) is GRANTED IN PART and DENIED IN PART. Summary judgment is granted as to the following claims: as to Count One, the court grants the defendant police officers summary judgment on Cooper's Fourth Amendment claim that there was no reasonable suspicion to stop the vehicle (on qualified immunity grounds), on Cooper's Fourth Amendment claim that there was no justification to remove Carter from the vehicle (on qualified immunity grounds), on Cooper's Fourteenth Amendment claim that the seizure unreasonably delayed Carter's ability to get medical treatment, and on Cooper's Fourteenth Amendment claim that the defendants' refusal to transport Carter in a police cruiser unreasonably delayed Carter's ability to get medical treatment. As to Count One, the court grants the City of Hartford summary judgment on Cooper's failure to train claim and Cooper's claim that the City's practice and custom of transporting gravely injured individuals by police cruiser was unconstitutional.

As to Count Two, the court grants the defendant police officers summary judgment on Cooper's claim that they had no reasonable suspicion to stop the vehicle (on state immunity grounds) and his claim that they unconstitutionally refused to transport Carter in a police cruiser to the hospital. As to Count Two, the court grants the City of Hartford summary judgment on Cooper's failure to train claim and Cooper's claim that the City's practice and custom of transporting gravely injured individuals by police cruiser was unconstitutional. As to Count Seven (indemnification), the court grants the City of Hartford summary judgment as to all underlying claims as to which the court has granted summary judgment because there is no genuine issue of material fact.

Summary judgment is denied as to the following claims: as to Count One, the court denies summary judgment to defendant police officers as to Cooper's Fourth Amendment claim that Carter was unconstitutionally subjected to prolonged detention, as to Cooper's Fourth Amendment claim that excessive force was used in removing Carter from the vehicle, and as to Cooper's Fourteenth Amendment claim that defendant police officers unconstitutionally delayed calling for an ambulance. As to Count Two, the court denies summary judgment to defendant police officers as to Cooper's claim that Carter was unconstitutionally removed from the vehicle, that Carter was unconstitutionally subjected to prolonged detention, that excessive force was used in removing Carter from the vehicle, and that defendant police officers unconstitutionally delayed calling for an ambulance. As to Count Three, the court denies summary judgment to defendant police officers and the City of Hartford on Cooper's wrongful death claims. As to Count Four, the court denies summary judgment to defendant police officers on Cooper's negligent infliction of emotional distress claim. As to Count Seven (indemnification), the court denies summary judgment to the City of Hartford as to all underlying claims as to which the court has denied summary judgment because there is a genuine issue of material fact.

***31 SO ORDERED.**

D.Conn., 2009.
Cooper v. City of Hartford
Slip Copy, 2009 WL 2163127 (D.Conn.)

Motions, Pleadings and Filings ([Back to top](#))

- [2007 WL 4458508](#) (Trial Pleading) Answer of Defendants Chief of Police Patrick J. Harnett, Sergeant Steven Miele, Shaun St. John, Victor Otero, Officer Jeffrey Hopkins, in Their Official Capacity and Individual Capacity to Plaintiff's Complaint (Sep. 25, 2007)
 - [3:07cv00823](#) (Docket) (May 24, 2007)
- END OF DOCUMENT

(c) 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Not Reported in F.Supp.2d, 2003 WL 1610778 (D.Minn.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
Elizabeth HATCH, et al., Plaintiffs,
v.
Ken GROSINGER, et al., Defendants.

No. Civ.01-1906(RHK/AJB).
March 3, 2003.

Robert M. McClay, McClay Alton, P.L.L.P., Saint Paul, Minnesota, for Plaintiffs.

C. David Dietz, Ramsey County Attorney's Office, Saint Paul, Minnesota, for Defendants.

MEMORANDUM OPINION AND ORDER

KYLE, J.

Introduction

*1 This matter comes before the Court on Defendants' Motion for Summary Judgment. Elizabeth Hatch, Charles Hatch and their children Robby, Kelley, and Katie Hatch (collectively, "the Hatches"), have sued Deputy Sheriff Ken Grosinger and Sheriff Bob Fletcher, in their individual and official capacities, the County of Ramsey, and John Does 1-15 (collectively, "Defendants") over the shooting death of the Hatches' dog, Gwennie. Defendants have moved for summary judgment on the grounds that they have qualified and official immunity from suit. For the reasons set forth below, the Court will grant Defendants' motion.

Background

On the morning of Saturday, June 23, 2001, six Ramsey County Deputies arrived at 568 Sherburne Ave., in Saint Paul, Minnesota, to serve a felony arrest warrant. (Defs.' Mem. Supp. Sum. J. at 1.) The deputies were attempting to locate Kenneth James Jorgenson, who was wanted for offering forged checks. (*Id.*) The Sheriff's Department had twelve past addresses for Jorgenson, and none since 1995. (Defs.' App. Ex. 3 (Personal Warrant Information for Kenneth James Jorgenson).) Kenneth James Jorgensen had not lived at 568 Sherburne since 1983. (McClay Aff. Ex. 28 (Jorgensen Aff.)) According to one of the deputies, "We couldn't find anything when [we] worked him up so this is-we are going up there to knock and see what we've got." (McClay Aff. Ex. 13 (Grosinger Dep.) at 9.) The deputies considered it unlikely that they would find Jorgenson at that address. (*Id.* at 30.)

A. The Hatches' Dog

Currently residing at 568 Sherburne were Charles and Elizabeth Hatch, their children, Robby, Kelley, and Katie Hatch, and their dog, Gwennie, a 58-pound female black labrador retriever. Elizabeth Hatch described the dog as

very gentle, she was-she was just a nice dog. She-I took her-I would take her with me to the school and the kids would, you know, play with her and meet her. She would lie down in the midst of a pile of kids and they'd all, you know-some of them if they were afraid, I could get her to lie down so that she was facing away from them so that they [could] kind of touch her tail. She was-she was-she was an awfully good dog....

(McClay Aff. Ex. 3 (Elizabeth Hatch Dep.) at 55-56.) Ms. Hatch, a professional dog trainer who owned and operated Good Dog Training Services, used Gwennie during her training classes:

[S]he was perfect with young puppies. She would play with them. Or she would lie down and let

them crawl on her. I didn't have to worry about her getting irritated with puppies in a young puppy class. So she was ideal for me to bring into a class setting and have no worries at all for my clients' dogs. [S]tudents of mine ... just told me wonderful things.... She was a great example.

(*Id.* at 108.)

Gwennie, however, had been known to behave aggressively toward strangers entering the Hatches' gated front yard. Myron Halley, for instance, the Hatches' regular mail carrier, had an encounter with the dog that the Sheriff's Department would later summarize in their report of the shooting incident:

*2 Halley described an incident this past winter where he shook the gate at 568 Sherburne. After getting no response, he opened the gate and delivered the mail. He said that he had turned and was heading back to the gate when he heard the side door open. He said that the dog came after him, and was about to bite him when he shoved a handful of mail at him. Halley said the dog bit the mail instead of "taking a chunk of my hand."

(Defs.App. Ex. 12 (Sheriff's Department Investigation Report) at 13.) After this incident, the post office suspended mail delivery at 568 Sherburne. (*Id.*) Postal service did not resume until the Hatches agreed not to let the dog out from the side door. (*Id.*)

Similarly, Wendy Zarse, the Hatches' relief letter carrier, told the Sheriff's Department that Gwennie would "go a little crazy" when she saw her. (*Id.* at 14.) Zarse said the dog would "jump on the fence and chase along the fence line as she walked by the yard barking and growling as it jumped." (*Id.*) Zarse refused to deliver mail when Gwennie was in the yard.

B. The Deputies Enter the Yard

At 9:15 a.m. on June 23, 2001, Ramsey County Deputies Ken Grosinger, Matt Lassegard, and Ken Urbiha walked to the chain link front gate at 568 Sherburne. (Defs.' App. Ex. No. 6 (Lassegard Dep.) at 15.) At the same time, Deputies Bob Marascuilo and Kent Mueller began heading to the back of the house in case Jorgensen attempted to flee. (McClay Aff. Ex. 17 (June 27, 2001 Statement of Ken Urbiha) at 7.) Sergeant Marie Ballard, the leader of the team, was stationed in the van. (Defs.' App. Ex. 1 (Ballard Dep.) at 60-63.) While Ballard, Marascuilo, and Grosinger were experienced deputies, Mueller, Urbiha, and Lassegard were trainees.

Outside the front gate, Grosinger explained to Lassegard and Urbiha what to look for to determine the presence of a dog. Grosinger considered this important information because of his own family experience with dogs: "My father was a U.S. postal carrier for 30 years. He was bitten a couple times very severely so just growing up around that. I was-dogs are something to be aware of." (McClay Aff. Ex. 13 at 17.) The deputies saw no evidence of a dog at 568 Sherburne and proceeded through the gate.

C. Mr. Hatch Describes the Incident

At the same time, Charles Hatch, his daughters, and Gwennie were exiting the rear of the house on the way to a veterinary appointment. As Mr. Hatch testified, "[T]he dog and the two girls, their noses, were to the door as I opened it, so all three exited the door at once. And I was directly behind." (McClay Aff. Ex. 4 (Charles Hatch Dep.) at 34.) As Mr. Hatch closed the back door, closed the screen door, walked down the rear steps, he heard Gwennie barking; within "one or two seconds," he heard shots. (*Id.* at 36.) The Hatches' neighbor from two doors down also "heard a dog bark, and then a split second later a number of shots." (McClay Aff. Ex. 6 (February 5, 2003 Statement of Maria Gonzalez).) As Mr. Hatch went around to the front, he saw the dog "heading back towards me in a wandering, lazy aimless manner, as though she were drunk...." (McClay Aff. Ex. 4 at 36.) He also saw two deputies backing away from him. The deputies "gave me this expression of kind of disbelief and 'Oh, oh,' something went wrong." (*Id.* at 38.) While Mr. Hatch was able to get Gwennie to a veterinarian, she died a short time later.

D. Deputies Describe the Incident

*3 The Sheriff's Department investigated the shooting. As Deputy Grosinger described the

incident:

I go through the gate and approach ... the porch area there.... I'm heading for the mailbox ..., one of the standard things I'll do is, and there was mail in the mailbox that morning is I'll look in the mailbox ... [to see] the names of who's living there.... [S]o I'm about to look at the mailbox ... and all the sudden [Deputy] Matt Lassegard ... yells dog, dog coming.... [A]lls I remember is that dog coming around the corner, it was kind of in-in a fishhook, its head is out but its body is slightly tipped to its left ... its head is kind of down and I see its teeth and its coming.... I don't remember drawing, I remember saying stop, probably would have been better to say down boy or something but I'll tell you it went quick....

(McClay Aff. Ex. 14 (June 28, 2001 Statement of Kenneth Grosinger) at 11.) Deputy Grosinger indicated that the dog was "three feet from me and coming" when he pulled the trigger. (*Id.*) He fired at least three shots and as many as five. For Grosinger, it was "the first time I ever shot ... except for at the range...." (*Id.* at 14.)

The other deputies' accounts of the incident parallel Grosinger's. According to the deputies, Gwennie approached as "a black blur, a black dog with its hackles up" (Defs.' App. Ex. 6 (Lassegard Dep.) at 24) and like a "black missile" (Defs.' App. Ex. 12 (Sheriff's Department Investigation Report)). As the Sheriff's investigation noted, "All three deputies describe a continuous high-speed approach by the dog, with the dog making [a] fishhook turn [toward Grosinger] at full speed. The dog never stopped until it was shot." (*Id.* at 7.)

Standard of Decision

A party is entitled to summary judgment if the evidence demonstrates that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In viewing the evidence, the Court makes its inferences in the light most favorable to the nonmoving party. Enterprise Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir.1996); *see also* Adkinson v. G.D. Searle & Co., 971 F.2d 132, 134 (8th Cir.1992). The burden is on the moving party, Enterprise Bank, 92 F.3d at 747; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and summary judgment should be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). In essence, the court performs a threshold inquiry to determine whether there is need for trial. *Id.*

Analysis

Defendants have moved for summary judgment on three grounds. First, Defendants assert that Deputy Grosinger is entitled to qualified immunity on the Hatches' § 1983 claim. Second, Defendants argue the Hatches' "failure to train" claim fails because the Hatches have not demonstrated a constitutional violation. Finally, Defendants argue they are entitled to official immunity against the Hatches' state law claim.

A. Qualified Immunity

*4 On summary judgment, the Court asks two questions to determine whether qualified immunity is appropriate. The Court first inquires whether the facts, taken in the light most favorable to the party asserting the injury, demonstrate a constitutional injury. Saucier v. Katz, 533 U.S. 194, 200 (2001); Siegert v. Gilley, 500 U.S. 226, 232 (1991). If, after viewing the facts in a light most favorable to the nonmoving party, a constitutional injury is not established, the Court may end the inquiry there. Saucier, 533 U.S. at 200. If, however, the Court finds a constitutional violation, it must ask whether the right was clearly established. *Id.* To determine whether a right is clearly established, the Court asks whether the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

1. Constitutional Injury

The Hatches have alleged that Officer Grosinger's shooting of their dog constitutes an unreasonable seizure in violation of the Fourth Amendment. The Fourth Amendment protects:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). "The destruction of property is 'meaningful interference' constituting a seizure under the Fourth Amendment...." Fuller v. Vines, 36 F.3d 65, 68 (9th Cir.1994) ("Fuller I"). As Defendants concede, the shooting and killing of a dog constitutes "destruction" and therefore a seizure of that dog. (See Defs.' Mem. Supp. Summ. J. at 9); see also Fuller v. Vines, 1997 WL 377162 (9th Cir.1997) (unpublished opinion) ("Fuller II") (shooting of dog constitutes seizure); Newsome v. Erwin, 137 F.Supp.2d 934 (S.D.Ohio 2000) (the killing of the lioness qualifies as a "seizure" under the Fourth Amendment); see also Leshner v. Reed, 12 F.3d 148, 150 (8th Cir.1993) (taking of dog states claim for seizure).

The first half of the qualified immunity inquiry therefore turns on whether the seizure was unreasonable. "In the ordinary case, the [Supreme] Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." United States v. Place, 462 U.S. 696, 701 (1983). When the state claims a right to make a warrantless seizure, the Court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Place, 462 U.S. at 703. Where the governmental interest justifying a seizure is sufficiently compelling and the nature and extent of the intrusion occasioned by the seizure is not disproportionate to that interest, the seizure may be reasonable even though effected without a warrant. Brown v. Muhlenberg Township, 269 F.3d 205, 210 (3d Cir.2001). ^{FN1}

^{FN1}. While the Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases, Plakas v. Drinski, 19 F.3d 1143, 1149 (7th Cir.1994), it does require officers' actions to be within the range of objectively reasonable conduct, Schulz v. Long, 44 F.3d 643, 649 (8th Cir.1995). If a seizure is disproportionately intrusive to the interest it serves, it is outside the range of objectively reasonable conduct under the Fourth Amendment. Brown, 269 F.3d 205.

***5** The government has an interest in allowing its officers to protect themselves from animal attacks while they are engaged in their legitimate duties. The Court must balance the government's interest against the interest of the Hatches, homeowners who, having done nothing to invite government scrutiny, suddenly found their dog shot in their yard on a Saturday morning. The Hatches have a clear interest in ensuring that their pets and other effects are secure within their close.

The balance of these interests depends on whether an objectively reasonable officer in the position of Deputy Grosinger could conclude that the Hatches' dog posed an imminent threat. See Schulz, 44 F.3d at 648 (in determining reasonableness, courts must examine the facts as known to the officer at the moment he effectuates the seizure). Were a reasonable officer in the position of Deputy Grosinger to conclude that the dog posed an imminent threat, the balance of interests tips away from the right of the Hatches to be secure their effects, and toward the officer and his right to defend his own personal safety. In the words of the Third Circuit,

[T]he state's interest in protecting life and property may be implicated when there is reason to believe the pet poses an imminent danger.... [T]he state's interest may even justify the extreme intrusion occasioned by the destruction of the pet in the owner's presence. This does not mean, however, that the state may, consistent with the Fourth Amendment, destroy a pet when it poses

no immediate danger and the owner is looking on, obviously desirous of retaining custody.

Brown, 269 F.3d at 210-11.

Viewing the facts in a light most favorable to the Hatches, the Court concludes that a reasonable officer could well have concluded that their dog posed an imminent threat. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Graham v. Connor, 490 U.S. 386, 395 (1989).

Here, the undisputed facts indicate that the dog, without restraint or owners in sight, made an aggressive charge which all three deputies in the yard regarded as an immediate threat to their personal safety. Deputy Urbiha backed up to the gate, Deputy Lassegard moved behind a chair, and Deputy Grosinger fired his weapon. While one could question Deputy Grosinger's choice to use the maximum level of force several seconds after Gwennie appeared, "the Fourth Amendment does not allow this type of 'Monday morning quarterback' approach because it only requires that the seizure fall within a range of objective reasonableness." Schulz, 44 F.3d at 649. Given the importance of the government's interest in assuring that its officers be allowed to protect themselves, the split-second decision-making required, and Gwennie's threatening behavior at the moment she was shot, the seizure was not so disproportionate to the interest at stake as to remove it from the realm of objectively reasonable conduct. Accordingly, the Court concludes that the seizure was reasonable. The Court therefore need not determine whether the right was clearly established, see Saucier, 533 U.S. at 200, and Deputy Grosinger is entitled to qualified immunity.

B. Failure to Train

*6 Defendants have also moved for summary judgment on the Hatches' claim that Sheriff Fletcher and Ramsey County failed to properly train and supervise Deputy Grosinger. A municipality may be held liable for deficient policies regarding the training of police officers where (1) the municipality's training practices are inadequate, (2) the municipality was deliberately indifferent to the rights of others in adopting them, and (3) an alleged deficiency in the city's hiring or training procedures actually caused the plaintiff's injury. Andrews v. Fowler, 98 F.3d 1069, 1076 (8th Cir.1996). To prevail, a plaintiff must show that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." City of Canton v. Harris, 489 U.S. 378, 390 (1989).

Where the plaintiff has failed to demonstrate a constitutional violation, a municipality cannot be held liable for a failure to train. Abbott v. City of Crocker, Mo., 30 F.3d 994, 999 (8th Cir.1994) ("The City cannot be liable in connection with ... a failure to train theory ... unless [the officer] is found liable on the underlying substantive claim."); Reynolds v. City of Little Rock, 893 F.2d 1004, 1007 (8th Cir.1990) ("Where there is no underlying constitutional violation, the presence or absence of policies which permit the use of excessive force [] is quite beside the point.") (internal quotation omitted). Because the Court has concluded that Officer Grosinger's shooting of the Hatches' dog was not an unreasonable seizure, the Court will enter summary judgment on the failure to train charge.

C. Official Immunity

Defendants also move for summary judgment on Plaintiffs' state law claim on the grounds of official immunity and official vicarious immunity. Under Minnesota law, "a public official charged by law with duties which call for the exercise of judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn.1988) (quoting Susla v. State, 247 N.W.2d 907 (Minn.1976)). Official immunity "protects public officials from the fear of personal liability that might deter independent action and impair the effective performance of their duties." Id. at 678. An official is not entitled to official immunity when he or she acted with malice. Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn.1992).

A police officer who performs his or her duty to prevent crime and enforce the law is not generally acting in a ministerial capacity, but is usually exercising discretion. Elwood, 423 N.W.2d at 678. Generally, police officers acting in emergency situations are required to exercise a significant amount

of independent judgment; the law affords police officers this discretion so that they are not overly constrained in times of emergency:

*7 Official immunity is provided because the community cannot expect police officers to do their duty and then to second-guess them when they attempt to conscientiously do it. To expose police officers to civil liability whenever a third person might be injured would ... tend to exchange prudent caution for timidity in the already difficult job.

Pletan, 494 N.W.2d at 41. Deputy Grosinger's response to the dog's advance-which required the sort of split-second decision-making that is the antithesis of a ministerial act-qualifies as discretionary.

Here, the record is bereft of any evidence of malice or bad faith that might strip Deputy Grosinger of his immunity for his discretionary act. See id. at 42; Elwood, 423 N.W.2d at 679. While the Hatches argue that "Deputy Grosinger killed Gwennie, not out of some perceived threat, but out of concern that not to shoot Gwennie would show fear of a barking dog and expose him to 'peer derision'" (Pls.' Mot. Opp. Sum. J. at 29), this is merely an attempt to read the facts of cases where official immunity was avoided onto the matter at hand, see Miskovitch v. Indep. Sch. Dist. 318, 226 F.Supp.2d 990, 1017 n. 11 (D.Minn.2002), rather than a genuine effort to argue for legitimate factual inferences. There is no support for this theory in the record. Without colorable evidence of malice, Deputy Grosinger is entitled to official immunity on the Hatches' state law claim.

Conclusion:

Based on the foregoing, and all of the files, records, and proceedings herein, IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. 41) is GRANTED. The Complaint (Doc. 1) is hereby DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

D.Minn.,2003.

Hatch v. Grosinger

Not Reported in F.Supp.2d, 2003 WL 1610778 (D.Minn.)

Motions, Pleadings and Filings ([Back to top](#))

• [0:01CV01906](#) (Docket) (Oct. 17, 2001)
END OF DOCUMENT

(c) 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 10, 2009

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56(a), the defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, hereby move for summary judgment as to the plaintiffs' complaint in its entirety, dated October 28, 2008.

As is more particularly set forth in the accompanying memorandum of law, exhibits and Local Rule 56(a)(1) statement, there is no genuine dispute of material fact and the defendants are entitled to summary judgment as:

- (1) The Fourth Amendment claims fail as a matter of law, as the entry into the yard was not a Fourth Amendment search, and was reasonable in any event, and the killing of the dog was reasonable under the circumstances;
- (2) The substantive due process claims fail as the Fourth Amendment is the appropriate remedy and even if it were not, the actions of the officers did not shock the conscience;
- (3) The officer are entitled to qualified immunity;
- (4) The failure to intervene claim fails, as Officer Pia did not have a realistic opportunity to intervene and did not reasonably believe that the plaintiffs' rights were being violated, as the killing of the dog was justified;

- (5) The Connecticut Constitution claim fails as it is not a recognized claim, and even if were, O'Hare's action of killing the dog was justified, as the dog posed an imminent threat;
- (6) The intentional infliction of emotional distress claim fails as there is no right to sue an individual for intentional infliction of emotional distress resulting from the death of a pet, and even if there was, the officers actions were not extreme and outrageous;
- (7) The trespass claim fails as the officers were performing official duties and therefore licensees;
- (8) The conversion claim fails as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified;
- (9) The negligence claim fails as the officers are entitled to governmental immunity

WHEREFORE, the defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, respectfully request that their motion for summary judgment be granted.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on August 10, 2009, a copy of the foregoing **Motion for Summary Judgment** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 10, 2009

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

I. FACTUAL BACKGROUND

The Rule 56(a)(1) statement is adopted in its entirety.

II. LAW AND ARGUMENT

A. LEGAL STANDARD

Summary judgment should be granted forthwith “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Rule 56 “mandate[s] the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A factual dispute is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A “material fact” is one whose resolution will effect the ultimate determination of a case. See Id.

In determining whether a genuine issue of material fact exists, the Court must resolve all ambiguities and draw all inferences in favor of the nonmoving party. Anderson, 477 U.S. at 255. However, “[t]he mere existence of a scintilla of evidence in support of the non-movant’s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” Hayut v. State University of New York, 352 F.3d 733, 743 (2nd Cir. 2003). “[T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.” (Emphasis in original.) Caldarola v. Calabrese, 298 F.3d 156, 160 (2nd Cir. 2002). A non-moving party may not rely on mere allegations, legal conclusions, unsupported statements, or a denial of the pleadings. See Celotex Corp., 477 U.S. at 327.

B. THE PLAINTIFF’S FOURTH AMENDMENT CLAIMS FAIL AS A MATTER OF LAW, AS THE ENTRY INTO THE YARD WAS NOT A FOURTH AMENDMENT SEARCH, AND WAS REASONABLE IN ANY EVENT, AND THE KILLING OF THE DOG WAS REASONABLE UNDER THE CIRCUMSTANCES

The complaint alleges that defendant O’Hare, while illegally remaining on the plaintiff’s property, unlawfully seized the plaintiff’s dog by shooting it in the chest and head without probable cause or other lawful justification in violation of 42 U.S.C. Section 1983 and the Fourth Amendment to the United States Constitution. See, Plaintiff’s Complaint, attached as **Exhibit H**, p. 4, ¶ 16.

1. THE OFFICERS' ENTRY INTO PROPERTY WAS JUSTIFIED AS IT WAS NOT A FOURTH AMENDMENT SEARCH

It is well established in constitutional jurisprudence that “the Fourth Amendment protects people, not places.” Katz v. United States, 389 U.S. at 351. Accordingly, Fourth Amendment protection requires that a person possess a legitimate expectation of privacy in the area searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir.1985) (*quoting* United States v. Chadwick, 433 U.S. 1, 7 (1977)). A Fourth Amendment “search,” does not occur unless the search invades an object or area where one has a subjective expectation of privacy that society is prepared to accept as objectively reasonable. *See, Illinois v. Caballes*, 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). In this regard, the home or an individual's “dwelling place” has been afforded a “heightened privacy interest.” Thomas, 757 F.2d at 1366.

Therefore, “[t]he touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy.” California v. Ciraolo, 476 U.S. 207, 211 (1986) (*quoting* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). “The place searched is highly relevant to the Fourth Amendment analysis because expectations of privacy in some places are afforded greater constitutional legitimacy than in others.” State v. Mooney, 218 Conn. 85, 94-95, *cert. denied*, 502 U.S. 919 (1991). “[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.” Oliver v. United States, 466 U.S. 170, 178 (1984).

The Second Circuit has noted that “[t]he route which any visitor to a residence would use is not private in the Fourth Amendment sense.” United States v. Reyes, 283 F.3d 446, 465 (2d

Cir.2002) (*quoting* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(e), at 499 (3d ed.1996)). Similarly, a “visual observation” of an object already exposed to public view is no search at all.” Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir.2004). Thus, the Second Circuit has repeatedly held that no Fourth Amendment search occurs when an officer enters a home's driveway, walkway, or similar area that is accessible to the general public. *See*, e.g., Reyes, 283 F.3d at 465 (no Fourth Amendment violation based on a law enforcement officer's presence on an individual's driveway when that officer was in pursuit of legitimate law enforcement business) (*citing* Krause v. Penny, 837 F.2d 595, 597 (2d Cir.1988)); *see also* United States v. Titmore, 437 F.3d 251, 259-60 (2d Cir.2006) (holding defendant did not have reasonable expectation of privacy in the porch and track of lawn that trooper used to reach stairway); *see also* Serby v. Town of Hempstead, No. 04-CV-901 (DRH)(MLO), 2006 WL 2853869, at *8 (E.D.N.Y. Sept. 30, 2006) (“Plaintiff cannot claim a reasonable expectation of privacy on the walkway or driveway that leads to his door or the unlocked screen door before the inner door to his house.”)

The heightened privacy interest afforded to a dwelling place extends to the curtilage, which has been described as an “area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life.” Oliver v. United States, 466 U.S. 170, 180 (1984). “The law distinguishes between the curtilage-the land immediately surrounding the home and, thus, considered a part of it-which is entitled to Fourth Amendment protection, and the land outside the curtilage, which, though it might be on the same private property, is not so protected.” United States v. Schuster, 775 F.Supp. 297, 306 (W.D.Wis.1990) (*citing* Oliver, 466 U.S. at 180); *see also* United States v. Dunn, 480 U.S. 294, 300 (1987) (*citing* Hester v. United States, 265 U.S. 57, 59 (1924)); United States v. Basile, 569 F.2d 1053, 1056 (9th Cir.1978).

“The concept of curtilage, unfortunately, evades precise definition.” United States v. Shroyer, 1998 WL 1585819, at *3 (S.D.Ohio 1998). “At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life.” California v. Ciraolo, 476 U.S. 207, 212 (1986) (*quoting* Oliver, 466 U.S. at 180 (*quoting* Boyd v. United States, 116 U.S. 616, 630 (1886))). “The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.” Id. at 212, 213.

In United States v. Dunn, 480 U.S. 294 (1987), the Supreme Court reaffirmed the principle of curtilage first set forth in Oliver and set forth four factors to be considered in determining whether an area was within the curtilage of a home and entitled to the same privacy protections as the home. Dunn held that “the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself . . . [T]he central component of this inquiry [is] whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.” Dunn, 480 U.S. at 300. The factors identified in Dunn require a court to examine: (1) the area's proximity to the main residence; (2) any enclosure of the property or area; (3) use of the property or area; and (4) steps taken to protect the property or area from view. Id. at 301.

Defining an area as curtilage is a legal conclusion that “relies essentially on factual determinations.” United States v. Reilly, 76 F.3d 1271, 1275 (2d Cir.1996). The definition of curtilage is based upon the particular premises and “factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself,” with a special focus on “whether the area harbors the intimate activity associated with the sanctity of a

man's home and the privacies of life.” United States v. Titemore, 437 F.3d 251, 258 (2d Cir.2006).

An individual must take affirmative steps to protect his privacy in his curtilage and his “open fields”-the real property beyond his curtilage. See, State v. Costin, 168 Vt. 175, 182 (1998) (holding that video surveillance of the defendant's open fields was not a search because the defendant took no steps to exclude the public from his land); *see also* State v. Hall, 168 Vt. 327, 331 (1998) (holding that officer's monitoring of the defendant's curtilage from his open fields was not an Article 11 search where the defendant took no steps to prevent public from traversing open fields to reach curtilage or to prevent view of curtilage from open fields). Government does conduct a search when it intrudes onto open fields that a reasonable person would expect to be private. State v. Kirchoff, 156 Vt. 1, 10 (1991). Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private. Id.

“[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.” Dunn, 480 U.S. at 300 (*citing* Oliver, at 180). The Fourth Amendment does not “protect the merely subjective expectation of privacy,” but only “those expectation[s] that society is prepared to recognize as reasonable.” Reilly, 875 F.Supp. at 114 (*quoting* Katz, 389 U.S. at 361).

Here, there was no reasonable expectation of privacy to the portion of the plaintiffs’ yard the officers entered. The officers entered the front yard through the open gate and then walked along the right side of the house. See, Exhibit B, p. 48, lines 12-16; p. 54, lines 3-12; **Exhibit A**, p. 41, lines 7-9; p. 42, lines 23-25; p. 43, line 1; p. 44, lines 3-10; **Exhibit B**, p. 48, lines 12-16; p. 54, lines 3-21; **Exhibit D**, p. 2, ¶¶ 12-13; Photograph 3; **Exhibit E**, p. 2, ¶¶ 12-13; Photograph 3. Before entering the back yard they saw the dog, turned around and ran. See, Exhibit B, p. 55,

lines 3-15; **Exhibit A**, p. 52, lines 15-21; **Exhibit A**, p. 56, lines 12-20; **Exhibit B**, p. 63, lines 14-18; **Exhibit A**, p. 56, lines 12-20; **Exhibit B**, p. 63, lines 19-24; **Exhibit D**, p. 3, ¶ 22; **Exhibit E**, p. 3, ¶ 22. This area of the yard was not enclosed, and the plaintiffs took no steps whatsoever to protect said area from entry or from view. Therefore, it cannot be considered “curtilage” and the officers’ entry was not a Fourth Amendment search.

First, it is undisputed that the yard was not enclosed. There was no fence that enclosed the property, and in fact, the front gate to the chain link fence was left open. Along the edge of the front yard of the property was an approximate 4 foot high chain link fence with multiple openings. See, **Exhibit F**, p. 116, lines 6-11; See, **Exhibit A**, p. 76, lines 17-18; **Exhibit D**, pp. 1-2, ¶¶ 8-9; Photograph 1; **Exhibit E**, pp. 1-2, ¶¶ 8-9; Photograph 1. The chain link fence had a large opening where the driveway was located. See, **Exhibit F**, p. 116, lines 6-11; **Exhibit A**, p. 76, lines 8-18; p. 77, lines 9-16; p. 78, lines 14-19; **Exhibit B**, p. 53, lines 13-24; p. 129, lines 18-25; p. 130, lines 1-17; **Exhibit D**, p. 2, ¶¶ 10-11; Photograph 2; **Exhibit E**, p. 2, ¶¶ 10-11; Photograph 2. There was also a gate in the chain link fence leading to the front door, which was left open. See, **Exhibit B**, p. 48, lines 12-16; p. 53, lines 13-24; p. 54, lines 4-7; **Exhibit A**, p. 79, lines 1-6; **Exhibit D**, p. 2, ¶¶ 12-13; Photograph 3; **Exhibit E**, p. 2, ¶¶ 12-13; Photograph 3.

Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard. See, **Exhibit B**, p. 131, lines 6-10; **Exhibit D**, p. 2, ¶¶ 14-15; Photographs 4a and 4b; **Exhibit E**, p. 2, ¶¶ 14-15; Photographs 4a and 4b. Furthermore, there was a portion of fencing on the side of the property that was knocked down. See, **Exhibit A**, p. 76, lines 20-24; p. 77, lines 14-17; **Exhibit D**, p. 2, ¶¶ 16-17; Photograph 5; **Exhibit E**, p. 2, ¶¶ 16-17; Photograph 5. Finally, there was no fence or barrier separating the front yard from the backyard. See, **Exhibit F**, p. 24, lines 4-15; page 25, lines 1-16; p. 45, lines 20-25; p. 46, line 1-

18; **Exhibit B**, p. 131, lines 6-10; **Exhibit D**, pp. 2-3, ¶¶ 18-19; Photographs 4a and 4b; **Exhibit E**, p. 2-3, ¶¶ 18-19; Photographs 4a and 4b. Therefore, it is undisputed that the property was not enclosed.

Also, the plaintiffs took no steps to protect their property from entry or from view. Neither the front yard nor back yard was enclosed by fencing or some other barrier. There was a large opening in the front fence where the driveway was located, and the front gate was left open. There was also no fencing or other barrier separating the front yard from the back yard. Therefore, anyone could simply walk from the street through the driveway opening, or open front gate, into the front yard and then access the back yard along either side of the residence.

Further, there was no stockade or similar type fencing in the front yard blocking ones view. There was merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no “No trespassing” signs or anything to that effect to keep people out of the property. See, **Exhibit A**, p. 76, lines 8-14; **Exhibit D**, p. 3, ¶ 20; **Exhibit E**, p. 3, ¶ 20. Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private. Kirchoff, 156 Vt. at 10.

Moreover, there are many other cases, involving similar circumstances to the present case, where the court found that the area accessed by the police did not constitute curtilage. See, U.S. v. Hayes, 551 F.3d 138, (2d Cir. 2008) (Path taken by police canine to east of house and through backyard to sniff scrub brush located 65 feet from back door of house and on border of neighbor's property, which revealed black bag containing narcotics in brush, did not invade the curtilage of the home for Fourth Amendment purposes; there was an alternative path to backyard along driveway in full view of street which was plainly outside curtilage, narcotic smell was so strong it could be smelled from 65 feet away, and if canine had taken alternate path he would

have led officer to bag); Simko v. Town of Highlands, 276 Fed.Appx. 39, 2008 WL 1925143 C.A.2 (N.Y.), May 01, 2008 (Court held that trees, bushes, and stumps around property did not significantly limit access or visibility and therefore area was not within curtilage of property); United States v. Reyes, 283 F.3d 446, 466-67 (2d Cir.2002) (no “search” where officers enter a driveway across which a chain was hung); United States v. Williams, 219 F.Supp.2d 346, 360 (W.D.N.Y.2002) (no expectation of privacy in driveway exposed to public); United States v. Hogan, 122 F.Supp.2d 358 (E.D.N.Y.2000) (yard in close proximity to house not part of curtilage where it is exposed to public view and no evidence that intimate activities associated with domestic life occurred there); State v. Hall, 719 A.2d 435 (Vt.,1998) (Officer was not within curtilage of defendant's house when officer viewed marijuana plant from wooded area behind house. Officer was standing five to ten feet from lawn in area just inside woods; only fencing behind defendant's house was ornamental, area where officer stood as well as where marijuana was located was beyond fence, there was no evidence that area was used for activities such as picnics, barbecues or other “privacies of life,” and defendant had not erected any fences or walls that would obstruct view of yard.)

Clearly, the facts in the present case do not support a conclusion that the area of the plaintiffs’ yard where the officers entered was curtilage. The officers entered the front yard through the open gate and then walked along the right side of the house. Before entering the back yard they saw the dog, turned around and ran. The area of the yard they entered was not enclosed and the plaintiffs took no steps whatsoever to protect said area from entry or view. Accordingly, the area was not “curtilage” and the plaintiffs did not have a reasonable expectation of privacy to said area. Therefore, the officers’ entry was not a Fourth Amendment search and

summary judgment should enter in favor of the officers on the plaintiffs' Fourth Amendment claim.

2. THE KILLING OF THE DOG WAS NOT AN UNREASONABLE SEIZURE, AS THE DOG POSED AN IMMINENT THREAT TO THE OFFICERS

Courts have consistently recognized that a law enforcement officer's killing of a dog constitutes a destruction of the owner's property and therefore a seizure under the Fourth Amendment. San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 975 (9th Cir.2005); *see also* Altman v. City of High Point, 330 F.3d 194, 205 (4th Cir.2003). However, the government retains a strong interest in allowing law enforcement officers to protect themselves and the citizenry from animal attacks. Altman v. City of High Point, N.C., 330 F.3d 194, 205 (2003). Thus, courts have generally held that no unreasonable seizure may be found where an officer has killed a dog that posed an imminent threat. *See, Altman*, 330 F.3d at 206 (officers reasonably shot and killed dogs that posed danger, including Rottweiler known to have previously attacked individuals in neighborhood, aggressive pack of dogs that attacked an officer, and Pit-bull mix that displayed aggressive behavior toward a meter reader); Hatch v. Grosinger, 2003 WL 1610778 (D.Minn.2003) (no unreasonable seizure where dog had exhibited threatening behavior). Similarly, in Warboys v. Officer Proulx, the Court held that "[a]n officer who encounters a 90- to 100-pound pit bull dog-a dog which is demonstrably not able to be restrained by its owner or guardian and which is approaching the officer at a rate of 6 feet per second and is at a distance of no more than ten feet-does not act unreasonably in shooting the dog to protect himself and his canine companion." 303 F.Supp.2d 111, 118 (D.Conn.2004).

In the present case, it is undisputed that there was no unreasonable seizure, as the dog posed an imminent threat. At the same time the officers observed the large dog, the dog looked in their direction and began to growl and charge at them. See, Exhibit F, p. 59, lines 21-25; p. 60, lines 1-2; **Exhibit A**, p. 56, lines 7-11; See, Exhibit B, p. 62, lines 9-13; p. 63, lines 8-13; **Exhibit G**, p. 15, lines 3-10. As the officers were running, the large dog was growling, snapping and lunging at O'Hare. See, Exhibit F, p. 60, lines 14-21; p. 62, lines 9-17; **Exhibit A**, p. 30, lines 3-5; p. 65, lines 12-22; **Exhibit B**, p. 64, lines 2-4. The dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner. See, Exhibit B, p. 64, lines 5-7; p. 66, lines 3-6; p. 88, lines 1-10; p. 97, lines 9-12; **Exhibit A**, p. 30, lines 3-5; p. 57, lines 8-16; p. 65, lines 12-22.

When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog. See, Exhibit A, p. 57, lines 17-21; p. 59, lines 17-25; **Exhibit B**, p. 64, lines 13-17; p. 65, lines 7-11; p. 67, lines 23-25; page 68, line 1; p. 68, line 25; page 69, lines 1-2. The dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. See, Exhibit A, p. 30, lines 3-5; p. 65, lines 12-22; **Exhibit B**, p. 64, lines 22-25; p. 65, lines 1-3; p. 88, lines 1-10; p. 97, lines 9-12. The dog continued to gain on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. See, Exhibit B, p. 66, lines 3-6; p. 87, lines 1-2; **Exhibit D**, p. 3, ¶ 23. Even if he had gotten out the driveway, O'Hare believed that the dog would have continued to chase him. See, Exhibit B, p. 87, lines 2-4; **Exhibit D**, p. 3, ¶ 24. Therefore, after making every effort to outrun the dog and get the dog to stop by yelling get back, O'Hare was left with no other choice than to shoot the dog as he believed that it was about to attack him. See, Exhibit B, p. 87, lines 1-2.

Officer O'Hare claims he discharged three rapid succession shots into the dog stopping it instantly. See, **Exhibit A**, p. 59, lines 3-7; p. 64, lines 11-21; **Exhibit B**, p. 65, lines 4-9; p. 69, lines 3-14; p. 74, lines 18-20. However, the minor plaintiff claims that O'Hare paused between his second and third shots, and did not shoot for a third time until after she called out, "don't shoot my dog." See, **Exhibit H**, p. 4, ¶ 19; **Exhibit G**, p. 26, lines 15-25; p. 27, lines 1-25; p. 28, lines 1-25; p. 29, line 1; p. 29, lines 7-24. Even under the minor plaintiff's version that the dog had been shot twice, before she called out "don't shoot my dog" did not diminish the threat posed by the dog to the officer.

Accordingly, Officer O'Hare made every effort to outrun and even stop the dog. However, after his attempts proved to be unsuccessful, and he observed the dog displaying threatening and aggressive behavior in his direction, he determined that the dog posed an imminent threat to him, and was left with no other choice than to shoot the dog. Therefore, there was no unreasonable seizure, and summary judgment should enter in his favor as to the plaintiffs' Fourth Amendment claim.

3. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR THE ENTRY INTO THE PROPERTY AND THE KILLING OF THE DOG

The defense of qualified immunity "shields government officials from liability for civil damages as a result of their performance of discretionary functions, and serves to protect government officials from the burdens of costly, but insubstantial lawsuits." Lennon v. Miller, 66 F.3d 416, 420 (2d Cir.1995). "[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of

which a reasonable person would have known.’” Wilson v. Layne, 526 U.S. 603, 609 (1999) (*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Huminski v. Corsones, 386 F.3d 116, 143 (2d Cir.2004) (*quoting* Shechter v. Comptroller of the City of New York, 79 F.3d 265, 268 (2d Cir.1996)).

The doctrine of qualified immunity is intended to strike a balance between the need, on one hand, to hold responsible public officials exercising their power in a wholly unjustified manner and, on the other hand, to shield officials responsibly attempting to perform their public duties in good faith from having to explain their actions. Locurto v. Safir, 264 F.3d 154, 162-63 (2d Cir.2001) (*quoting* Kaminsky v. Rosenblum, 929 F.2d 922, 924-25 (2d Cir.1991)). Qualified immunity shields them from liability if their actions were objectively reasonable, as evaluated in the context of legal rules that were clearly established at the time. Loria v. Gorman, 306 F.3d 1271, 1281 (2d Cir.2002) (*quoting* Poe v. Leonard, 282 F.3d 123, 132 (2d Cir.2002)). “Qualified immunity is more than a simple defense-it is an entitlement not to stand trial or face the other burdens of litigation, ... an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” Id. (*quoting* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

The Supreme Court established the analysis for determining whether an officer is entitled to qualified immunity. See, Saucier v. Katz, 533 U.S. 194 (2001). Qualified immunity involves a three-step analysis: (1) whether the officials violated the plaintiff's constitutional right; (2) whether the law was clearly established with respect to that right; and (3) whether reasonable officers could disagree about whether their conduct was illegal. See, Id. Even if a right is clearly established, a defendant may still establish immunity by “showing that reasonable persons in their position would not have understood that their conduct was within the scope of

the established prohibition.” LaBounty v. Coughlin, 137 F.3d 68, 73 (2d Cir.1998) (*quoting* *In re State Police Litig.*, 88 F.3d 111, 123 (2d Cir.1996)). “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” Loria v. Gorman, 306 F.3d 1271, 1281 (2d Cir.2002). at 1281-82 (quoting *Saucier*, 533 U.S. at 202) (additional citations omitted). In other words, if a defendant violated a right, the court must “analyze the objective reasonableness of the [defendant's] belief in the lawfulness of his actions.” Loria v. Gorman, 306 F.3d 1271, 1282 (2d Cir.2002). The protection of qualified immunity applies regardless of whether the government official's error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” Pearson v. Callahan, 129 S.Ct. 808, 815 (2009) *citing* Groh v. Ramirez, 540 U.S. 551, 567 (2004); *see also* Butz v. Economou, 438 U.S. 478, 507 (1978) (noting that qualified immunity covers “mere mistakes in judgment, whether the mistake is one of fact or one of law”).

Applying these principles to the present case, it was objectively reasonable for the officers to believe that the plaintiffs’ yard was not “curtilage” and their entry was not a Fourth Amendment search. First, it is undisputed that the yard was not enclosed. There were no fences that enclosed the property, and in fact, the front gate to the chain link fence was left open. Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard.

Also, the plaintiffs took no steps to protect their property from entry or view. Neither the front yard nor the back yard was enclosed by fencing or some other type of barrier, there was a large opening in the front fence where the driveway was located and the front gate was left open. There was also no fencing or barrier separating the front yard from the back yard. Therefore,

anyone could simply walk from the street through the driveway opening, or open front gate, into the front yard and then access the back yard along either side of the house. Further, there was no stockade or similar type fencing in the front yard blocking ones view. There was merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no “No trespassing” signs or anything to that effect to keep people out of the property. Therefore, it was objectively reasonable for the officers to believe that the plaintiffs’ yard was not “curtilage” and their entry was not a Fourth Amendment search.

It was also objectively reasonable for O’Hare to believe that the dog posed an imminent threat. It is undisputed that the dog chased O’Hare, he attempted to elude the dog, the dog closed in on him and that the dog was shot at close range. Therefore, it was objectively reasonable for O’Hare to view the dog as an imminent threat, which justified his use of deadly force.

C. THE PLAINTIFFS’ SUBSTANTIVE DUE PROCESS CLAIMS FAIL AS THE FOURTH AMENDMENT IS THE APPROPRIATE REMEDY AND EVEN IF IT WERE NOT, THE ACTIONS OF THE OFFICERS DID NOT SHOCK THE CONSCIENCE

1. THE PLAINTIFFS’ SUBSTANTIVE DUE PROCESS CLAIMS FAILS AS THERE IS AN EXPLICIT TEXTUAL SOURCE OF PROTECTION FOR THE ALLEGED MISCONDUCT

The plaintiffs asserts in the complaint that the actions of O’Hare were so extreme, callous and outrageous that they fell outside of the scope of acceptable police behavior and shocked the conscious of civilized society, in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983. See, Exhibit H, p.4, ¶ 20. However, the substantive due process claims are improper as there is an explicit textual source of protection for the alleged misconduct (Fourth Amendment).

Where a constitutional amendment provides an explicit textual source of protection against certain government misconduct, that amendment is the guide for analysis of the claim rather than the generalized notion of substantive due process. Simons v. New York, 472 F.Supp.2d 253, 265 (N.D.N.Y.2007); Bryant v. City of New York, 404 F.3d 128, 135-36 (2d Cir.2005); County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998); Albright v. Oliver, 510 U.S. 266, 273 (1994); Graham v. Connor, 490 U.S. 386, 395 (1989). A “substantive due process” claim will be dismissed, “where a specific constitutional provision prohibits [the] government action” at issue. Velez v. Levy, 401 F.3d 75, 94 (2d Cir. 2005). In such cases, “plaintiffs seeking redress for that prohibited conduct in a §1983 suit cannot make reference to the broad notion of substantive due process.” Id.; *see also* Kia P. v. McIntyre, 235 F.3d 749, 757-58 (2d Cir.2000) (“Where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff’s claims under that explicit provision and not the more generalized notion of substantive due process.”) (*quoting* Conn v. Gabbert, 526 U.S. 286, 293 (1999)); Andrews v. City of West Branch, 2004 WL 2808385 n. 1 (N.D.Iowa 2004) (where officer killed pet dog, substantive due process claim was not warranted since Fourth Amendment provided explicit protection against unreasonable seizure).

Here, the Fourth Amendment provides explicit protection against unreasonable searches and seizures. It is undisputed that the entry into one’s property and the killing of one’s dog is governed by the Fourth Amendment. Therefore, the plaintiffs’ substantive due process claim fails as a matter of law and summary judgment should enter in favor of the defendants.

2. THE PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM FAILS AS THE ACTIONS OF THE OFFICERS DID NOT SHOCK THE CONSCIENCE

Even if the court were to allow the plaintiffs' substantive due process claim to remain, said claim fails as the officers' actions did not shock the conscience. The Due Process Clause "guarantee[s] more than fair process"; it "cover [s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998). Substantive due process, the most general of the Due Process protections, is often identified within the context of protecting certain fundamental rights (e.g., bodily integrity, marriage, procreation), *see* Albright v. Oliver, 510 U.S. 266, 272 (1994) (plurality), or protecting individuals from other arbitrary government behavior "so brutal and so offensive to human dignity" that it "shocks the conscience" of the court. Rochin v. California, 342 U.S. 165, 172, 174 (1952).

However, "not all wrongs perpetrated by a government actor violate due process." Smith ex rel. Smith v. Half Hollow Hills Cent. School Dist., 298 F.3d 168, 173 (2d Cir.2002). In order to prevail on a substantive due process claim, the plaintiff must first establish the existence of a "federally protectable property right," which requires a demonstration of a clear entitlement to a benefit under state law. *See, Natale*, 170 F.3d at 263. "Substantive due process has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm that our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . Thus, substantive due process has been held to safeguard such intimate activities as marriage; Loving v. Virginia, 388 U.S. 1, 12 (1967); contraception; Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965);

education of children; Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923); and bodily integrity. Rochin v. California, 342 U.S. 165, 171-72 (1952).” ATC Partnership v. Windham, 251 Conn. at 597, 606 (1999).

Second, a plaintiff must also demonstrate that “the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” Benzman v. Whitman, 523 F.3d 119, 126 (2d Cir.2008); *see* Lewis, 523 U.S. at 846-47; Velez v. Levy, 401 F.3d 75, 93 (2d Cir.2005) (*quoting* County of Sacramento v. Lewis, 523 U.S. 833, 847 n. 8 (1998)). Substantive due process “prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” United States v. Salerno, 481 U.S. 739, 746 (1987). A plaintiff must show “not just that the action was literally arbitrary, but that it was arbitrary in the constitutional sense. Mere irrationality is not enough: only the most egregious official conduct, conduct that shocks the conscience, will subject the government to liability for a substantive due process violation based on executive action.” O'Connor v. Pierson, 426 F.3d 187, 203 (2d Cir.2005).

“The protections of substantive due process are available only against egregious conduct which goes beyond merely offend[ing] some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience.” Smith v. Half Hollow Hills Central School, 298 F.3d 168, 173 (2d Cir.2002); *see* Arnone v. Connecticut Light & Power Co., 90 Conn.App. 188, 201-03 (2005). The test of what shocks the conscience “is not precise . . . and it also varies depending on the factual context.” Eichenlaub v. Township of Indiana, 385 F.3d 274, 285 (3d Cir.2004), *cert. denied* 128 S.Ct. 201 (2007). “[M]alicious and sadistic abuses of power by government officials, intended to oppress or to cause injury and designed for no legitimate government purpose, unquestionably shock the

conscience.” Velez v. Levy, 401 F.3d at 94. (*quoting Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2d Cir.2001)). On the other hand, “[o]verzealous or erroneous government action alone does not give rise to a constitutional violation.” Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir.1994).

Here, it is undisputed that Officer O’Hare attempted to outrun and even stop the dog. Before firing his weapon, he determined that the dog posed an imminent threat to him, and was left with no other choice than to shoot the dog.

Officer O’Hare claims he discharged three rapid succession shots into the dog stopping it instantly. See, Exhibit A, p. 59, lines 3-7; p. 64, lines 11-21; Exhibit B, p. 65, lines 4-9; p. 69, lines 3-14; p. 74, lines 18-20. However, the minor plaintiff claims that O’Hare paused between his second and third shots, and did not shoot for a third time until after she called out, “don’t shoot my dog.” See, Exhibit H, p. 4, ¶ 19; Exhibit G, p. 26, lines 15-25; p. 27, lines 1-25; p. 28, lines 1-25; p. 29, line 1; p. 29, lines 7-24.

Even assuming that the factual circumstances presented by the plaintiff were true, the actions of officer O’Hare cannot be said to be “so brutal and offensive to human dignity” that it “shocks the conscience” of the court. Merely “[o]verzealous . . . government action” does not violate due process. See, Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir.1994).

There are many second circuit decisions involving government actions that were similar to the plaintiffs’ version of O’Hare’s actions in this case, but the court found no violation of due process. See, Warboys v. Proulx, 303 F.Supp.2d 111 (D.Conn.,2004) (Police officer’s shooting and killing of dog owner’s pitbull, which escaped from residence and ran toward officer, was reasonable conduct that did not shock the conscience, and did not infringe upon dog owner’s

substantive due process rights and entitle him to damages under §1983; officer's conduct was objectively reasonable because pitbull weighed between 90 and 100 pounds, traveled distance of approximately 30 feet in five seconds, and would have reached officer in one and one-half seconds or less.); Wilds v. Gomes, United States District Court, D. Connecticut, Civil No. 3:06-cv-1021 (CFD) (March 24, 2009) 2009 WL 801629 (Court found that Bridgeport police officer Griselle Gomez, upon seeing dog attack plaintiff, fired her gun at the dog, which resulted in bullet hitting the dog and two bullet fragments hit plaintiff in his leg, did not shock the conscience. Court held that officer encountered a situation requiring immediate action).

Furthermore, there are many examples of behavior that is insensitive or ill-advised, but does not meet the high threshold of conscience shocking behavior violative of due process. See, Santiago de Castro v. Morales Medina, 943 F.2d 129, 130-32 (1st Cir.1991) (The court held that a supervisor's extensive criticism and defamation of teacher was not conscience shocking, even though it resulted in that teacher suffering from an anxiety disorder with depressive characteristics); DeLeon v. Little, 981 F.Supp. 728, 735 (D.Conn.1997) (The court held that a plaintiff's allegations that the defendant exhibited a hostile attitude toward her, intimidated and threatened her, harassed her at home and at work, among other things, did not constitute conscience-shocking behavior.)

Therefore, even if the court were to allow the plaintiffs' substantive due process claim, said claim fails as the actions of O'Hare, alleged by the plaintiffs, are not conscience shocking. Accordingly, summary judgment should enter in favor of the officers on the plaintiffs' substantive due process claim.

3. THE OFFICER ARE ENTITLED TO QUALIFIED IMMUNITY AS TO THE SUBSTANTIVE DUE PROCESS CLAIM

Even assuming that the factual circumstances presented by the plaintiff were true, it was objectively reasonable for an officer in O'Hare's position to believe that his actions were not violative of due process. Assuming the plaintiff's version of the events is true, that O'Hare paused between shots two and three, when she said "don't shoot my dog," officer O'Hare's actions were at most insensitive. They can hardly be said to be "so egregious, so outrageous, that it shocks the contemporary conscience." The factual basis supporting the decision to use deadly force is undisputed, and justified O'Hare firing his weapon at the dog. The decision to shoot the dog three times rather than two is not conscience shocking, and even if this court were to find his decision to shoot three times to be conscience shocking, that fact was not clearly established under case law, therefore entitling O'Hare to qualified immunity

D. THE PLAINTIFFS' FAILURE TO INTERVENE CLAIM FAILS, AS PIA DID NOT HAVE A REALISTIC OPPORTUNITY TO INTERVENE AND DID NOT REASONABLY BELIEVE THAT THE PLAINTIFFS' RIGHTS WERE BEING VIOLATED, AS THE KILLING OF THE DOG WAS JUSTIFIED

The complaint alleges that Pia failed to prevent O'Hare from unlawfully shooting the plaintiff's dog. See, Exhibit H, p. 4, ¶ 17. A police officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers. Ricciuti v. N.Y. City Transit Auth., 124 F.3d 123, 129 (2d Cir.1997); O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir.1988). A state actor may be held liable for failing to prevent another state actor from committing a constitutional violation if (1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's

position would know that the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene. See, Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1992); Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 129 (2d Cir.1997).

In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring. O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir.1988).

“Whether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise.” Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1992); Diaz v. City of New York, No. 00-CV-2944, 2006 U.S. Dist. LEXIS 93923, at *28, 2006 WL 3833164 (E.D.N.Y. Dec. 29, 2006) (“In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring.”)

Here, since O’Hare was justified in shooting the dog (see Fourth Amendment analysis above), Pia cannot be held liable for his failure to intervene, as a reasonable person in his position would not have known that the plaintiffs constitutional rights were being violated. Also, Pia did not have a realistic opportunity to intervene. The entire sequence of events, from the time the officers first saw the dog to the time the first shot was fired, took only approximately 5 seconds, but no more than 10 seconds. See, Exhibit D, p. 3, ¶ 26; Exhibit E, p. 3, ¶ 23. Furthermore, it is undisputed that Pia himself was fleeing from the dog attack and had his back turned most of the time to Officer O’Hare and the dog. See, Exhibit A, p. 56, lines 21-25; p. 57, line 1; Exhibit A, p. 57, lines 2-7. Therefore, he did not have a realistic opportunity to intervene.

Accordingly, the plaintiffs’ failure to intervene claim fails as a matter of law and summary judgment should enter in favor of officer Pia. At a minimum, the law was not clearly

established that an officer, under the circumstances facing officer Pia, had an opportunity and duty to intervene, thereby entitling Pia to qualified immunity

E. THE PLAINTIFFS' CONNECTICUT CONSTITUTION CLAIM FAILS AS THEY HAVE FAILED TO PLEAD A RECOGNIZED CLAIM, AND EVEN IF THEY HAD, O'HARE'S ACTION OF KILLING THE DOG WAS JUSTIFIED, AS THE DOG POSED AN IMMINENT THREAT

The complaint alleges that the defendants' actions violated Article One, Section 7 of the Connecticut Constitution. See, Exhibit H, p. 5, ¶ 22. However, the plaintiffs have failed to plead a recognized claim, and even if they had, said claim fails as there was no unreasonable seizure, since O'Hare's action of killing the dog was justified, as the dog posed an imminent threat.

In Binette v. Sabo, 244 Conn. 23 (1998), the Connecticut Supreme Court held that a private right of action for money damages existed stemming from alleged violations of the search and seizure (§7) and false arrest (§ 9) sections of the Connecticut Constitution. Id. at 25-26. However, Binette emphasized that its decision did not mean that a constitutional cause of action exists for every violation of Connecticut's state constitution and that whether to recognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis. Accordingly, a Binette-type remedy is strictly construed and the facts in this case do not rise to the level of those in Binette. Therefore, the plaintiffs have failed to plead a cognizable claim.

The Connecticut Supreme Court has consistently looked to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its federal progeny as a guide in determining whether to create a Bivens action for an alleged state constitutional

violation. See Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314, 334-38 (1993); ATC Partnership v. Windham, 251 Conn. 597, 613-14 (1999). Thus far, the Court has been reluctant to create private causes of action for money damages under the Connecticut Constitution. See generally, ATC Partnership v. Town of Windham, 251 Conn. 597 (1999) (declining to recognize a cause of action for alleged violation of substantive due process rights under article first § 8); Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314 (1993) (same). In Kelley Property, the Court referenced the Bivens line of Supreme Court cases and noted that, as a general rule, a plaintiff should not be able to maintain a Bivens action unless he can establish that he would otherwise be without any remedy. See id., at 337-38, 339.

To date, a cause of action for money damages has been created in only one limited circumstance. See Binette v. Sabo, 244 Conn. 23 (1998). In Binette, the plaintiffs, Joseph and Janet Binette, brought suit for compensatory and punitive damages against Police Chief Mahlon Sabo and Police Officer Anthony Languell. The plaintiffs alleged that the defendants entered their home without permission or a warrant. Id. at 26. According to the plaintiffs, Chief Sabo threatened Mrs. Binette with arrest and pushed her, causing her to fall over a table and against a wall. Id. The plaintiffs further alleged that Chief Sabo repeatedly slammed Mr. Binette's head against a car. Finally the plaintiffs alleged that Officer Languell struck Mr. Binette in the head and kicked him while he was lying on the ground experiencing an epileptic seizure. Id. The Court ultimately allowed a claim for violations of Article First, §§ 7 and 9 of the Connecticut Constitution in light of the egregious circumstances of the case. See id. at 49-50. The Binette Court, however, made clear that such a remedy is not available in every case involving allegations of state constitutional violations. Specifically, the Court stated, "our decision to

recognize a *Bivens*-type remedy in this case does not mean that a constitutional cause of action exists for every violation of our state constitution.” Id. at 47. The Court further held that,

[w]hether to recognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis [T]hat determination will be based upon a multifactor analysis. The factors to be considered include: the nature of the constitutional provision at issue; the nature of the purported unconstitutional conduct; the nature of the harm; separation of powers considerations and the other factors articulated in *Bivens* and its progeny; the concerns expressed in *Kelley Property Development, Inc.*; and any other pertinent factors brought to light by future litigation.

Id. at 48.

Subsequent to Binette, the Connecticut Supreme Court reaffirmed its reluctance “to create an all-encompassing damages action for any and all alleged violations of state constitutional provisions.” ATC Partnership, 251 Conn. at 613. The Court further highlighted the fact that their decision to create a private cause of action in Binette was premised upon the egregious police misconduct alleged in that case, namely the physical confrontation with the police in addition to the claim of unlawful search and seizure. Id. at 614-15. Finally, the Court noted that the governmental status of the defendants in Binette as police officers was not itself dispositive to the creation of a private cause of action under the state constitution. Id. at 616.

The Connecticut Superior Courts addressing the viability of a cause of action pursuant to the Connecticut Constitution subsequent to the Binette ruling have consistently held that no private cause of action for money damages exists. See e.g. Bazzano v. City of Hartford, 1999 WL 1097174, at *1 (Conn. Super. Ct. Nov. 18, 1999) (Copy attached as **Exhibit I**) (declining to recognize a private cause of action under Connecticut Constitution, Article First, §§ 7, 8 and 9); Boudreau v. City of Middletown, 1998 WL 321858 (Conn. Super. Ct. June 9, 1998) (Copy attached as **Exhibit J**) (refusing to recognize a viable cause of action under Article First, §§ 1, 8

and 20 of the Connecticut Constitution); Aselton v. East Hartford, 2002 WL 31875443 (Conn. Super. Ct. Dec. 3, 2002) (Copy attached as **Exhibit K**) (declining to recognize a damages claim against a municipality pursuant to Article First, §§ 4, 7, 8, 9, and 14 of the Connecticut Constitution), aff'd on other grounds, 277 Conn. 120 (Conn. 2006); McKirenan v. Amento, 2003 WL 22333200 (Conn. Super. Ct. Oct. 2, 2003) (Copy attached as **Exhibit L**) Peters v. Town of Greenwich, 2001 WL 51671 (Conn. Super. Ct. Jan. 2, 2001) (Copy attached as **Exhibit M**).

Based on the above, the plaintiffs' claims of violations of Article First, §7 of the Connecticut Constitution fail as a matter of law as no viable cause of action exists under the circumstances of this case. Unlike Binette, the instant matter does not entail the misconduct the Court found so egregious to warrant the creation of a private cause of action. There is no dispute that the instant matter involves no physical confrontation akin to the force at issue in Binette. Such an allegation "is a far cry from the alleged egregious police misconduct that [the Court] held to be actionable in Binette." ATC Partnership, 251 Conn. at 615. Thus, this matter can hardly be said to be synonymous with Binette so as to warrant the creation of a private cause of action in this matter. Id. Furthermore, the actions here deal with the killing of a dog, where Binette dealt with the savage beating of an individual.

Because of the case-by-case nature of the claim, the Binette court was careful to delineate a multifactor analysis for the determination whether a cause of action exists under a specific set of facts. The Binette Court held the multifactor analysis to include:

the nature of the constitutional provision at issue; the nature of the purported unconstitutional conduct; the nature of the harm; separation of powers considerations and the other factors articulated in *Bivens* and its progeny; the concerns expressed in *Kelley Property Development, Inc.*; and any other pertinent factors brought to light by future litigation.

Binette v. Sabo, 244 Conn. at 47-8.

Article First, §7 of the Connecticut Constitution states, “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. “ As described above, the officers’ entry into the property and killing of the dog was justified.

Additionally, there *are* separations of powers considerations at issue, which counsel against a state constitutional claim. Here, we are dealing with police action, which is an extension of the executive branch of municipal government. If a cause of action under the state constitution is created in this case, it will lead to “second-guessing” by the judiciary on executive actions. Moreover, this second-guessing will have a chilling effect on police actions. “The threat of liability . . . may have a chilling effect on the zeal with which [police officers] undertake their responsibilities.” See, Kelly Property, 226 Conn. at 342.

Moreover, as was the case in Kelley Property, the plaintiffs have adequate alternative remedies. They could have brought a negligence claim against the officers, and also have recourse through 42 U.S.C. §1983, which is one of the claims here.

Most importantly the facts alleged by the plaintiffs, do not rise to the level announced in Binette. This is nothing like Binette, where the husband’s head was slammed repeatedly against a car; he was struck in the head and kicked, while on the ground experiencing an epileptic seizure; the wife was threatened with arrest and imprisonment and pushed into a wall and over a table.

Accordingly, this Court should carefully consider the directions of the Supreme Court in Binette. The Court did not purport to announce an overarching universal principle. Binette, 244

Conn. at 47. It expressly cautioned that the availability of access to a separate tort action under Binette should be analyzed on a case-by-case basis only, a caution duly repeated. Therefore, summary judgment should enter in favor of the officers on the state constitutional claims.

On the other hand, even if the court were to find that such a claim was cognizable, it fails as there was no unreasonable seizure, since the officer's action of killing the dog was justified, as the dog posed an imminent threat. See, Altman, 330 F.3d at 206. Also, the entry into the property was not a Fourth Amendment search (see Fourth Amendment analysis above).

Moreover, this State Constitutional claim should come with a defense based on federal qualified immunity jurisprudence. The Connecticut Supreme Court has often looked to federal case law interpreting the Federal Constitution when examining its own Constitution. In fact, the Connecticut Supreme Court analogized the constitutional tort action arising under Article First, sections 7 and 9, to the action described by the United States Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Natcortics, 403 U.S. 388, 390-7 (1971). Binette v. Sabo, 244 Conn. 23, 45-48 (1998); *see* ATC Partnership v. Town of Windham, 251 Conn. 597 (1999).

It only makes sense that the State Constitutional claim should come with a defense based on federal qualified immunity jurisprudence. Qualified immunity extends to government officials performing discretionary functions. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The doctrine strikes a balance “between the need, on one hand, to hold responsible public officials exercising their power in a wholly unjustified manner and, on the other hand, to shield officials responsibly attempting to perform their public duties in good faith from having to explain their actions to the satisfaction of a jury.” Kaminsky v. Rosenblum, 929 F.2d 922, 924-25 (2d Cir. 1991) *citing* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). If the Connecticut

Supreme Court looks to federal precedent for analogous provisions in federal law for its state constitutional interpretation, the only consistent interpretation is that the state constitutional cause of action may be properly interposed by a state qualified immunity defense.

Accordingly, the court should grant summary judgment in favor of the officers on the state constitutional claim based on the defense of qualified immunity.

F. THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM FAILS AS THERE IS NO RIGHT TO SUE AN INDIVIDUAL FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS RESULTING FROM THE DEATH OF A PET, AND EVEN IF THERE WAS, THE OFFICERS ACTIONS WERE NOT EXTREME AND OUTRAGEOUS

The complaint alleges that the defendant O'Hare shot the plaintiff's dog in the head in the presence of K.H., as she pleaded with the defendant not to shoot her dog, and that O'Hare knew or should have known that his actions would cause severe emotional distress to K.H. See, **Exhibit H**, p. 5, ¶ 24. The complaint also alleges that by his actions, O'Hare intentionally or recklessly inflicted emotional distress on the plaintiff's minor daughter. See, **Exhibit H**, p. 5, ¶ 25.

The Connecticut Supreme Court has stated that, in order to recover damages on a claim for intentional infliction of emotional distress it must be shown: (1) that the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress and (4) that the emotional distress sustained by the plaintiff was severe. Petyan v. Ellis, 200 Conn. 243, 253 (1986); Carrol v. Allstate Ins. Co., 262 Conn. 433, 442-43 (2003).

“Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!” . . . Conduct . . . that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.” Appleton v. Board of Education, 254 Conn. 205, 210-11 (2000).

“Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine.” Bell v. Board of Education, 55 Conn.App. 400, 410 (1999); Appleton v. Board of Education, 254 Conn. 205, 210 (2000). Only where reasonable minds disagree does it become an issue for the jury. Id. “[I]n assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function. In this capacity, the role of the court is to determine whether the allegations of a complaint set forth behaviors that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility, the court is not fact finding, but rather is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress.” Tracy v. New Milford Public Schools, 101 Conn.App. 560, 569, *cert. denied*, 284 Conn. 910 (2007).

However, “[n]o Connecticut cases specifically allow recovery for negligent infliction of emotional distress resulting from an injury solely to property.” Delco v. Reed, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 99 0172435 (January 3, 2000,

Hickey, J.) (court held that plaintiff's claim for negligent infliction of emotional distress was predominantly based on damage to property and, therefore, did not state a claim upon which relief could be granted). In Connecticut, “[o]ur common law has never recognized a right to sue an individual for intentional or negligent infliction of emotional distress resulting from injury to such property as a pet.” Myers v. Hartford, 84 Conn.App. 395, 402, *cert. denied*, 271 Conn. 927 (2004). “Labeling a pet as property fails to describe the emotional value human beings place on the companionship that they enjoy with such an animal. Although dogs are considered property . . . this term inadequately and inaccurately describes the relationship between an individual and his or her pet. That having been said, there is no common-law authority in [Connecticut] that allows plaintiffs to recover noneconomic damages resulting from a defendant's alleged negligent or intentional act resulting in the death of a pet.” Id.; *see also* Bose v. Lewis, Superior Court of Connecticut, Judicial District of New London No. 4101451 (Dec. 14, 2005, Devine, J.) (Court granted motion to strike claim for emotional distress as a result of the death of a pet. Court cited Hartford v. Meyers, and ruled that said count was improper in that no cause of action was stated.); Coston v. Reardon, Superior Court of Connecticut, No. 063892 (Oct. 18, 2001).

Therefore, the intentional infliction of emotional distress claim fails as a matter of law, as Connecticut does not recognize such a claim based upon acts resulting in the death of a pet. Furthermore, even if there were such a claim, the officers’ actions were not extreme and outrageous. It is undisputed that Officer O’Hare made every effort to outrun and even stop the dog. There is no dispute that he was justified in using deadly force on the dog under the circumstances, and his decision to fire three times instead of two was not, as a matter of law, “beyond the bounds of civilized society”, “atrocious” or “utterly intolerable.” Therefore,

summary judgment should enter in favor of the officers on the claim for intentional infliction of emotional distress.

G. THE PLAINTIFFS' TRESPASS CLAIM FAILS AS THE OFFICERS WERE PERFORMING OFFICIAL DUTIES AND THEREFORE LICENSEES

The complaint alleges that the defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so and their actions constituted a trespass under Connecticut law. See, Exhibit H, p. 5, ¶¶ 27-28. However, the officers were in the course of performing their official duties, and were therefore not trespassers but licensees.

Under Connecticut common law, the essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury. City of Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 87 (2007). However, a policeman who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee. 38 Am.Jur., Negligence, s 124. In fact, if the conditions for the exercise of a public duty exist, the occupier would not be privileged to exclude the officer. 2 Harper & James, Torts s 27.14 n. 21; see U.S. v. St. Clair, 240 F.Supp. 338 (D.C.N.Y. 1965).

It has long been held that a police officer who makes such an entry onto private property, in the course of performing his official duties, is not a trespasser but a licensee. Roberts v. Rosenblatt, 146 Conn. 110 (1959); Haffey v. Lemieux, 154 Conn. 185 (1966); see also Wroniak v. Ayala, Superior Court, judicial district of Hartford, Docket No. 94 0544499 (June 13, 1995, Sheldon, J.). Many other courts have held that a police officer who makes such an entry onto

private property, in the course of performing his official duties, is not a trespasser but a licensee. See, Furstain v. Hill, 218 Conn. 610, 615 (1991); State v. Plummer, 241 A.2d 198 (1967); State of Connecticut v. Alexander, Superior Court of Connecticut, Judicial District of Fairfield. No. CR060215063 (June 3, 2008, Hauser, J.)

In the present case, the officers were in the course of performing their official duties, and were therefore not trespassers but licensees. See, Exhibit D, p. 3, ¶ 27; Exhibit E, p. 3, ¶ 24. Accordingly, the plaintiffs' trespass claim fails as a matter of law and summary judgment should enter in their favor.

H. THE CONVERSION CLAIM FAILS AS THE OFFICERS DID NOT EXERCISE AN UNAUTHORIZED DOMINION OVER THE DOG GIVEN THAT THEIR ACTIONS WERE JUSTIFIED

The complaint alleges that the defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog deprived the plaintiff of his property, a beloved family pet, resulting in damages - conversion. See, Exhibit H, p. 6, ¶ 30. However, the officers did not exercise an unauthorized dominion over the dog as their actions were justified.

To establish a claim for conversion, a plaintiff must show that: (1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property before its conversion; and (3) defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights. Noses v. Martin, 360 F.Supp.2d 533, 541 (S.D.N.Y.2004). "The tort of [c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights . . . In addition, conversion requires that the owner

be harmed as a result of the unauthorized act.” News America Marketing In-Store, Inc. v. Marquis, 86 Conn.App. 527, 544 (2004), *cert. granted*, 273 Conn. 905 (2005); Suarez-Negrette v. Trotta, 47 Conn.App. 517, 521 (1998).

In the present case, the officers did not exercise an unauthorized dominion over the dog as their actions were justified. O’Hare’s actions were not “unauthorized.” O’Hare was justified in shooting the dog as it posed an imminent threat to him. (see analysis above); *see also Altman*, 330 F.3d at 206. Accordingly, the conversion claim fails as a matter of law and summary judgment should enter in favor of the officers.

I. THE NEGLIGENCE CLAIM FAILS AS THE OFFICERS ARE ENTITLED TO GOVERNMENTAL IMMUNITY

The complaint alleges that O’Hare and Pia were negligent in encountering the plaintiff’s property without lawful authority, thereby placing themselves in a situation that caused the plaintiff’s dog to react and bark, resulting in the aforementioned harm to the plaintiffs. See, Exhibit H, p. 6, ¶ 32. However, the negligence claim fails as the officers are entitled to governmental immunity.

“Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society . . . In contrast, municipal officers are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion . . . This is because society has no analogous interest in permitting municipal officers

to exercise judgment in the performance of ministerial acts.” Violano v. Fernandez, 280 Conn. 310, 318-319 (2006)

“The hallmark of a discretionary act is that it requires the exercise of judgment. On the other hand, ministerial acts are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action . . . Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact . . . there are cases where it is apparent from the complaint.” Lombard v. Edwards J. Peters, Jr., P.C., 252 Conn. 623, 628 (2000). The Supreme Court “has approved the practice of deciding the issue of governmental immunity as a matter of law.” Doe v. Petersen, 279 Conn. 607, 613 (2006).

“It is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the part of the municipality.” Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 180 (1988). “While it is so that statutes, regulations, and policies can create ministerial duties, when they relate to fire, police, or other public safety services, they are most often held to create discretionary duties . . . The Superior Court has consistently held that the [a]cts and omissions of police officers in the exercise of their duties are discretionary in nature.” Soderlund v. Merrigan, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 05 4002396 (July 13, 2007, Holzberg, J.).

“The investigation of crimes and the decisions to make arrests for them is clearly a discretionary rather than a ministerial function.” Escobales v. New Britain, Superior Court, judicial district of New Britain, Docket No. CV 06 4009470 (May 5, 2006, Shapiro, J.) (41 Conn. L. Rptr. 351), *quoting* Skrobacz v. Sweeney, 49 Conn. Supp. 15, 32 (2003); *see also*

Mikita v. Barre, Superior Court, judicial district of New Haven, Docket No. CV 99 0430564 (May 22, 2001, Munro, J.); Peters v. Greenwich, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 95 0147192 (January 2, 2001, D'Andrea, J.) (28 Conn. L. Rptr. 671, 674) (“acts or omissions of police officers in the exercise of their duties are discretionary in nature”); Elinsky v. Marlene, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV 96 0557659 (October 31, 1997, Hale, J.T.R.) (arresting plaintiff, submitting false statements in affidavit in support of arrest warrant, and improperly interviewing witnesses and investigating “require, in some measure, an exercise of judgment by the individual municipal employees”); Gonzalez v. Bridgeport, Superior Court, judicial district of Fairfield, Docket No. CV 88 253464 (June 4, 1993, Fuller J.) (specifically holding that an officer’s decision to arrest is discretionary). Therefore, the actions of the officers in the present case were discretionary acts entitled to governmental immunity.

However, “[t]here are three exceptions to discretionary act immunity. First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure . . . Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws . . . Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.” Violano v. Fernandez, 280 Conn. at 319-20. Of the three, the last is the only applicable exception. However, the plaintiff cannot satisfy all three of its required elements.

“By its own terms, [the imminent harm] test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.” Doe v. Petersen, 279 Conn. at 616. The Supreme

Court has stated that “this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception.” Violano v. Fernandez, 280 Conn. at 329.

“[T]he criteria of ‘identifiable person’ and ‘imminent harm’ must be evaluated with reference to each other. An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. Likewise, the alleged imminent harm must be imminent in terms of its impact on a specific identifiable person.” Doe v. Petersen, 279 Conn. at 620-21.

“For the purposes of the ‘imminent harm’ exception, however, it is impossible to be an identifiable person in the absence of any corresponding imminent harm.” Id., at 621. “The ‘apparentness’ requirement is grounded in the policy goal underlying all discretionary act immunity, that is, keeping public officials unafraid to exercise judgment . . . It surely would ill serve this goal to respond adequately to a harm that was not apparent to him or her.” Doe v. Petersen, 279 Conn. at 616-17.

The complaint alleges that O’Hare and Pia were negligent in entering the plaintiff’s property without lawful authority. See, Exhibit H, p. 6, ¶ 32. At the time the officers entered the property, there was no one they observed or identified. See, Exhibit D, p. 3, ¶ 21; Exhibit E, p. 3, ¶ 21. More specifically, there was no identifiable person as a potential victim of a specific imminent harm at the time the officers entered the property.

Also, at the time they entered the property, there was no imminent harm. “Imminent” has been defined as “about to occur, impending” and “ready to take place, near at hand.” Purzycki v. Fairfield, 244 Conn. at 116. In the instant matter, the alleged harm to the plaintiff, namely observing the dog being shot, implicates a wide range of factors, which could have occurred at

an unspecified time in the future or not at all. For example, the dog could have been inside, the officers could have gotten a better start and outran the dog, the minor plaintiff could have stopped the dog, the dog could have been on a leash or the minor plaintiff could have been present inside the home and not witnessed the shooting at all. At the time they entered the property, the officers had no idea that there was a dog in the back yard, let alone that it would violently and aggressively chase them. Thus, the purported risk of harm implicates a wide range of factors, which cannot be said to be imminent. See Evon, 211 Conn. at 508.

Accordingly, the officers were involved in discretionary acts and the identifiable person exception is not applicable. Therefore, the officers are entitled to governmental immunity and summary judgment should enter in their favor.

J. THE RECKLESSNESS CLAIM FAILS AS A MATTER OF LAW

The complaint alleges that O'Hare and Pia were reckless in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs. See, Exhibit H, p. 6, ¶ 32.

"Recklessness is a state of consciousness with reference to the consequences of one's acts. It is more than negligence, more than gross negligence. The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Wanton misconduct is reckless misconduct. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." Craig v. Driscoll, 262 Conn. 312, 342 (2003).

“While [the Connecticut Supreme court has] attempted to draw definitional distinctions between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing. The result is that willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.” Id. at 342-43.

Here, the officers’ actions were not reckless. They entered a portion of the property, to which the plaintiffs did not have a reasonable expectation of privacy, and encountered a dog that posed an imminent threat to them. After unsuccessfully attempting to evade and stop the dog, O’Hare shot the dog as it was clear that it posed an imminent threat to him. Therefore, the officers’ entry into the property was justified as was O’Hare’s shooting of the dog.

Even assuming that the plaintiffs’ version of the events is accurate, the officers’ actions were justified under both Fourth Amendment and substantive due process standards (see analysis above). Therefore, the officers’ actions can hardly be said to be “highly unreasonable conduct, involving an extreme departure from ordinary care.” Moreover, since the officers believed that their entry into the property and shooting of the dog was justified, they did not possess the “state of consciousness” required to deem their actions reckless.

III. CONCLUSION

For the foregoing reasons, the defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, are entitled to summary judgment in their favor.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on August 10, 2009, a copy of the foregoing **Memorandum in Support of Motion for Summary Judgment** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 10, 2009

**LOCAL RULE 56(a)(1) STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE**

1. On December 20, 2006, Hartford police officers O'Hare and Laureano observed an individual later identified as George Hemingway, drop something and walk away quickly in front of 717 Garden Street, Hartford, CT. See, *Deposition of Pia*, attached as **Exhibit A**, p. 17, lines 16-20; *Deposition of O'Hare*, attached as **Exhibit B**, p. 20, lines 1-19; p. 24, lines 23-25; p. 25, lines 1-4; *Deposition of Laureano*, attached as **Exhibit C**, p. 26, lines 6-13.

2. George Hemingway was known to O'Hare and Laureano as member of the West Hill street gang, which was involved in weapons, guns, trafficking narcotics and homicide. See, **Exhibit A**, p. 17, lines 11-15; p. 18, lines 14-21; p. 19, lines 19-25; p. 20, line 1; **Exhibit B**, p. 20, lines 1-19; p. 23, lines 5-18.

3. O'Hare and Laureano then exited their vehicle and picked up what Hemingway had dropped and determined that it was heroin. See, **Exhibit B**, p. 24, lines 13-22; p. 25, lines 19-24; **Exhibit C**, p. 27, lines 5-19.

4. After identifying the item as heroin, O'Hare and Laureano informed Hemingway to stop and he complied. See, **Exhibit B**, p. 25, lines 5-7.

5. During the officers' conversation with him, Hemingway informed the officers there were two guns that were placed or about to be placed in an abandoned vehicle located in

the backyard of 297 Enfield Street, Hartford, CT. See, **Exhibit C**, p. 34, lines 5-17; **Exhibit A**, p. 22, lines 14-19; p. 30, lines 1-15; p. 32, lines 1-7; p. 32, lines 21-25; p. 33, lines 10-25; p. 34, lines 1-2; **Exhibit B**, p. 18, lines 5-20; p. 27, lines 3-25; p. 28, lines 1-12; p. 39, line 25; p. 40, lines 1-7; p. 45, lines 20-25.

6. The officers were concerned for the public safety, wanted to get guns off the street and possibly even catch the suspect stashing the guns. See, **Exhibit A**, p. 70, lines 20-25; p. 71, lines 1-6; **Exhibit B**, p. 71, lines 1-8; *Affidavit of O'Hare*, attached as **Exhibit D**, p 1, ¶ 6; *Affidavit of Pia*, attached as **Exhibit E**, p 1, ¶ 6.

7. Officers Pia and O'Hare then drove to 297 Enfield Street. See, **Exhibit A**, p. 34, lines 3-9; p. 38, lines 17-19; **Exhibit B**, p. 46, lines 6-9; p. 47, lines 2-7.

8. Officers Pia and O'Hare parked their cruiser a few houses away from 297 Enfield Street, fearing that it could be a set up or an ambush. See, **Exhibit A**, p. 39, lines 4-7; **Exhibit B**, p. 47, lines 2-11.

9. After parking, Officers Pia and O'Hare exited the cruiser and approached 297 Enfield Street. See, **Exhibit A**, p. 39, lines 21-25; p. 40, line 1; **Exhibit B**, p. 48, lines 12-13.

10. 297 Enfield Street in Hartford, CT is a large two family house that is painted red and white. See, *Deposition of Glenn Harris*, attached as **Exhibit F**, p. 12, lines 3-4; **Exhibit D**, p 1, ¶ 7; **Exhibit E**, p 1, ¶ 7.

11. Along the edge of the front yard of 297 Enfield Street was an approximate 4 foot high chain link fence with multiple openings. See, **Exhibit F**, p. 116, lines 6-11; **Exhibit A**, p. 76, lines 17-18; **Exhibit D**, pp. 1-2, ¶¶ 8-9; Photograph 1; **Exhibit E**, pp. 1-2, ¶¶ 8-9; Photograph 1.

12. The chain link fence along the front of 297 Enfield Street had a large opening where the driveway was located. See, **Exhibit F**, p. 116, lines 6-11; **Exhibit A**, p. 76, lines 8-18; p. 77, lines 9-16; p. 78, lines 14-19; **Exhibit B**, p. 53, lines 13-24; p. 129, lines 18-25; p. 130, lines 1-17; **Exhibit D**, p. 2, ¶¶ 10-11; Photograph 2; **Exhibit E**, p. 2, ¶¶ 10-11; Photograph 2.

13. There was also a gate in the chain link fence leading to the front door, which was open. See, **Exhibit B**, p. 48, lines 12-16; p. 53, lines 13-24; p. 54, lines 4-7; **Exhibit A**, p. 79, lines 1-6; **Exhibit D**, p. 2, ¶¶ 12-13; Photograph 3; **Exhibit E**, p. 2, ¶¶ 12-13; Photograph 3.

14. There was no fence or barrier blocking the view or path of travel to either the front yard or backyard of 297 Enfield Street. See, **Exhibit B**, p. 131, lines 6-10; **Exhibit D**, p. 2, ¶¶ 14-15; Photographs 4a and 4b; **Exhibit E**, p. 2, ¶¶ 14-15; Photographs 4a and 4b.

15. Additionally, there was a portion of fencing on the side of 297 Enfield Street that was knocked down. See, **Exhibit A**, p. 76, lines 20-24; p. 77, lines 14-17; **Exhibit D**, p. 2, ¶¶ 16-17; Photograph 5; **Exhibit E**, p. 2, ¶¶ 16-17; Photograph 5.

16. There was no fence or barrier separating the front yard from the backyard at 297 Enfield Street. See, **Exhibit F**, p. 24, lines 4-15; page 25, lines 1-16; p. 45, lines 20-25; p. 46, line 1-18; **Exhibit B**, p. 131, lines 6-10; **Exhibit D**, pp. 2-3, ¶¶ 18-19; Photographs 4a and 4b; **Exhibit E**, p. 2-3, ¶¶ 18-19; Photographs 4a and 4b.

17. There were no “No trespassing” signs on the fence or any other location directing people stay out of the front or back yard at 297 Enfield Street. See, **Exhibit A**, p. 76, lines 8-14; **Exhibit D**, p. 3, ¶ 20; **Exhibit E**, p. 3, ¶ 20.

18. Officers Pia and O’Hare then walked into the front yard of 297 Enfield Street through the opened front gate of the chain link fence. See, **Exhibit B**, p. 48, lines 12-16; p. 54, lines 3-12.

19. Officers Pia and O'Hare then walked across front yard and around the right side of house towards the backyard of 297 Enfield Street. See, **Exhibit A**, p. 41, lines 7-9; p. 42, lines 23-25; p. 43, line 1; p. 44, lines 3-10; **Exhibit B**, p. 48, lines 12-16; p. 54, lines 3-21.

20. As Officers Pia and O'Hare approached the rear of the residence, they heard movement and rustling in the backyard. See, **Exhibit A**, p. 52, lines 1-14.

21. As Officers Pia and O'Hare were walking along right side of house, O'Hare was in front with Pia behind him. See, **Exhibit A**, p. 49, lines 15-25.

22. As they proceeded towards the back of the house, Officer O'Hare reached the rear of the residence, and peeked around corner giving him a partial view of the backyard. See, **Exhibit B**, p. 55, lines 3-15; **Exhibit A**, p. 52, lines 15-21.

23. When Officer O'Hare peeked around the corner, he observed a large brown and white dog. See, **Exhibit B**, p. 55, lines 15-21; **Exhibit A**, p. 52, lines 22-25; p. 53, lines 1-5; p. 54, lines 3-10; **Exhibit F**, p. 59, lines 18-20; *Deposition of K.H.*, attached as **Exhibit G**, p. 15, lines 11-15.

24. At the same time O'Hare observed the large dog, the dog looked in the direction of the officers and began to growl and charge at them. See, **Exhibit F**, p. 59, lines 21-25; p. 60, lines 1-2; **Exhibit A**, p. 56, lines 7-11; See, **Exhibit B**, p. 62, lines 9-13; p. 63, lines 8-13; **Exhibit G**, p. 15, lines 3-10.

25. O'Hare then yelled "dog, run." See, **Exhibit A**, p. 56, lines 12-20; **Exhibit B**, p. 63, lines 14-18.

26. Both officers O'Hare and Pia then turned around and ran back towards the direction they entered the property. See, **Exhibit A**, p. 56, lines 12-20; **Exhibit B**, p. 63, lines 19-24.

27. The officers never rounded the corner of the house and entered the back yard, before turning and running back to the front yard. See, **Exhibit D**, p. 3, ¶ 22; **Exhibit E**, p. 3, ¶ 22.

28. As the officers were running, the large dog chased them and was growling, snapping and lunging at O'Hare. See, **Exhibit F**, p. 60, lines 14-21; p. 62, lines 9-17; **Exhibit A**, p. 30, lines 3-5; p. 65, lines 12-22; **Exhibit B**, p. 64, lines 2-4.

29. Officer Pia rounded the front of the house, ran through front yard and towards the large opening in the chain link fence where driveway is located. See, **Exhibit A**, p. 56, lines 21-25; p. 57, line 1.

30. As Pia rounded the corner and O'Hare followed, the dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner. See, **Exhibit B**, p. 64, lines 5-7; p. 66, lines 3-6; p. 88, lines 1-10; p. 97, lines 9-12; **Exhibit A**, p. 30, lines 3-5; p. 57, lines 8-16; p. 65, lines 12-22.

31. When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog's advance on him. See, **Exhibit A**, p. 57, lines 17-21; p. 59, lines 17-25; **Exhibit B**, p. 64, lines 13-17; p. 65, lines 7-11; p. 67, lines 23-25; page 68, line 1; p. 68, line 25; page 69, lines 1-2.

32. After O'Hare yelled "get back" numerous times, the dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. See, **Exhibit A**, p. 30, lines 3-5; p. 65, lines 12-22; **Exhibit B**, p. 64, lines 22-25; p. 65, lines 1-3; p. 88, lines 1-10; p. 97, lines 9-12.

33. During this time, Officer Pia was able to run out of the opening in the front yard chain link fence near the driveway. See, **Exhibit A**, p. 57, lines 2-7.

34. However, the dog was gaining too fast on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. See, **Exhibit B**, p. 66, lines 3-6; p. 87, lines 1-2; **Exhibit D**, p. 3, ¶ 23.

35. Even if he had gotten out the driveway, O'Hare believed that the dog would have continued to chase him and he knew that he could not outrun the dog. See, **Exhibit B**, p. 87, lines 2-4; **Exhibit D**, p. 3, ¶ 24.

36. When the dog was just about next to and lunging towards him, O'Hare shot the dog, aiming in a downward direction. See, **Exhibit B**, p. 65, lines 4-9; p. 72, lines 24-25; p. 73, lines 1-3; p. 73, lines 10-25; p. 74, lines 1-17; p. 86, lines 11-15.

37. O'Hare discharged three shots into the dog stopping it instantly. See, **Exhibit A**, p. 59, lines 3-7; p. 64, lines 11-21; **Exhibit B**, p. 65, lines 4-9; p. 69, lines 3-14; p. 74, lines 18-20.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on August 10, 2009, a copy of the foregoing **Local Rule 56(a)(1) Statement of Material Facts Not in Dispute** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

COPY

GLEN HARRIS, individually and P.P.A. *
as guardian for K.H., a minor child *
Plaintiffs *

vs. *

JOHNMICHAEL O'HARE, *
ANTHONY PIA and *
CITY OF HARTFORD *
Defendants *

CIVIL ACTION NO.
3:08CV01644 (RNC)

JUNE 3, 2009

DEPOSITION
OF
ANTHONY PIA

Taken before Sandy K. Visentin, Registered Professional Reporter and Notary Public in and for the State of Connecticut, pursuant to the Federal Rules of Civil Procedure, at the Law Offices of Jon L. Schoenhorn & Associates, LLC, 108 Oak Street, Hartford, Connecticut, on Wednesday, June 3, 2009, commencing at 2:11 p.m.

Sandy K. Visentin, LSR, RPR
CT Lic. #SHR.234
Andrews Reporting Service
330 Cook Hill Road
Cheshire, CT 06410
(203) 271-2190

1 Q. Where are you assigned now?

2 A. Currently assigned to Northwest Patrol, midnights.

3 Q. Do you know where Officer O'Hare was assigned
4 currently?

5 A. I believe he's assigned to the Intelligence
6 Division.

7 Q. Who is your immediate supervisor currently?

8 A. Sergeant John Bremser.

9 Q. B-r-e-m-s-e-r?

10 A. Correct.

11 Q. Do you know George Hemingway?

12 A. Yes, I do.

13 Q. How do you know George Hemingway?

14 A. From dealing with him on various incidents on the
15 street.

16 Q. Did you know him prior to December 20th of 2006?

17 A. Yes, I did.

18 Q. Did you see George Hemingway on December 20th,
19 2006?

20 A. Yes, I did.

21 Q. Where did you see him?

22 A. I don't recall the exact address where we were.

23 Q. Do you remember what street you were on?

24 A. To the best of my recollection, it was Vineland
25 Terrace, I believe.

1 Q. Could it have been Garden Street?

2 A. It could have been Garden Street.

3 Q. And do you recall the circumstances under which
4 you first encountered George Hemingway on December 20th,
5 2006?

6 A. I don't really recall, no.

7 Q. What did you know of George Hemingway as of that
8 date?

9 A. Can you rephrase the question?

10 Q. Yeah, tell me what you knew about him before you
11 encountered him that day?

12 A. As a person, is that what you're saying?

13 Q. Yeah.

14 A. Okay. I was aware that he was a gang member in
15 the area.

16 Q. Do you remember which gang he was involved in?

17 A. Yes, I do.

18 Q. Which gang?

19 A. West Hell.

20 Q. Hell, H-e-l-l?

21 A. Correct.

22 Q. And Hemingway is spelled like the author?

23 MR. GERARDE: What do you mean by that?

24 Could you spell that for us?

25 MR. SCHOENHORN: H-e-m-i-n-g-w-a-y.

1 MR. GERARDE: Are you asking if he agrees
2 with that?

3 MR. SCHOENHORN: No, I'm giving that to the
4 reporter.

5 MR. GERARDE: Okay.

6 BY MR. SCHOENHORN:

7 Q. Do you agree that's how he spells his name?

8 A. I don't know. I would have to look at the report.

9 Q. All right. In any event, have you previously
10 arrested, prior to December 20th, 2006, George Hemingway for
11 anything?

12 A. I don't recall if I personally arrested him but I
13 do believe he was arrested by members of Northeast
14 Conditions Unit in the past.

15 Q. Do you know what he had been arrested for as
16 of December 20th; that is, before that encounter on that
17 day?

18 A. I don't remember that.

19 Q. What was his reputation, as far as you were
20 concerned, on that day before you encountered him?

21 A. His reputation was to be a member of a violent
22 street gang, and he is known to be in the presence of guns
23 as well as to carry guns.

24 Q. Was he known to be a drug dealer or be involved
25 with drugs?

1 A. Yes, he was.

2 Q. Both of those things?

3 A. Both of those.

4 Q. Do you know whether he was on probation or patrol
5 as of December 20th, 2006?

6 A. I don't remember.

7 Q. When you saw him on December 20th, 2006, where was
8 he in relation to your vehicle?

9 A. I believe he was standing outside of
10 Officer Laureano's vehicle.

11 Q. And where were you when you first saw him?

12 A. I don't remember.

13 Q. Were you in a vehicle yourself?

14 A. I couldn't tell you exactly, but most likely
15 because I would have had to have driven to wherever they
16 were.

17 Q. And how is it that you happened to drive to
18 wherever they were that day?

19 A. I'm sorry, I don't understand the question.

20 Q. How did you know to drive to a location where
21 Officer Laureano and Mr. Hemingway were present?

22 A. I don't recall. Either Officer Laureano had
23 called us to that location or it was put out over the air.
24 I don't remember that.

25 Q. What would be the difference between those two

1 A. I don't remember the exact number.

2 Q. Roughly?

3 A. Normally, we were six, a six-man unit. But there
4 was a period when we were between six and twelve.

5 Q. You don't recall as you sit here today whether on
6 December 20th, 2006, you were a six-man unit or a twelve-man
7 unit?

8 A. Right, I don't remember that. Like I said, there
9 was a period where we were more than six but I don't know if
10 it was prior to that date or not.

11 Q. Was Sergeant St. John the supervisor of the entire
12 unit, whether it was six or twelve at that time?

13 A. I believe so, yes.

14 Q. So tell me what you recall about the encounter
15 with Mr. Hemingway when you first saw him in the presence of
16 Officer Laureano?

17 A. What I recall is Officer Laureano had advised
18 myself and Officer O'Hare that Mr. Hemingway had given him
19 information regarding several guns.

20 Q. Who was driving that day?

21 A. Driving my vehicle?

22 Q. Your unit?

23 A. I don't recall who was driving.

24 Q. Well, let me be more specific. Were you driving
25 that unit that day?

1 Q. Did he suggest you do anything on that day?

2 A. I think it was a mutual agreement that if we had
3 information there was guns in a particular place we would
4 attempt to go find them.

5 Q. Well, let's go back. Tell me exactly what
6 Officer Laureano, to the best of your recollection, the
7 words he used to tell you what he had learned?

8 A. I couldn't tell you the exact words he used, but
9 he did relay information that there was possibly two
10 firearms before 297 Enfield Street.

11 Q. Did Officer Laureano indicate to you how it was
12 that he had learned this information?

13 A. Again, I don't know the exact words he used
14 but he had informed us that he got the information from
15 George Hemingway.

16 Q. Did Officer Laureano indicate to you whether or
17 not Hemingway had a source for his information that was
18 conveyed?

19 A. I don't remember that exactly.

20 Q. Do you recall whether Officer Laureano indicated
21 in any way to you that afternoon whether or not
22 Mr. Hemingway had personal knowledge about the existence of
23 guns based on having himself either seen them or other
24 personal direct knowledge about it?

25 A. Can you restate the question, you lost me in the

1 Officer Laureano told you about these guns on Enfield Street
2 that suggested that Mr. Hemingway had personal knowledge as
3 to having seen those weapons at that location?

4 A. As far as I remember, there was information that
5 he had personally seen or personally known there was. I
6 don't know how he received that information. I couldn't
7 tell you that for sure.

8 Q. So as you sit here now, your testimony is that
9 Officer Laureano told you that Mr. Hemingway had seen guns
10 located on Enfield Street?

11 MR. GERARDE: Object to the form. He said
12 that was his impression.

13 MR. SCHOENHORN: Well, I'm trying to narrow
14 that down. There's a lot of things you can have
15 an impression about.

16 BY MR. SCHOENHORN:

17 Q. Did he tell you that Mr. Hemingway had, in fact,
18 seen guns on Enfield Street?

19 A. I don't recall the exact word-for-word
20 conversation that I had with Officer Laureano.

21 Q. Is it to the best of your recollection that the
22 information was based on firsthand knowledge of
23 Mr. Hemingway and not on thirdhand hearsay or rumor?

24 A. Again, my impression was that it was firsthand
25 knowledge.

1 Q. Did Officer Laureano inform you as to when
2 Mr. Hemingway had obtained the information concerning guns
3 somewhere on Enfield Street?

4 A. Can you restate that again?

5 MR. SCHOENHORN: Actually, could that just be
6 reread to you.

7

8 [Question read back.]

9

10 THE WITNESS: I don't know the exact
11 conversation again, but I do know that it was
12 supposed to be -- the guns were supposed to either
13 have just been placed there or were being in the
14 process of being placed there.

15 BY MR. SCHOENHORN:

16 Q. Did he say anything about an abandoned car being
17 located on Enfield Street?

18 A. He did.

19 Q. And having added that information to refresh your
20 recollection, tell me everything you remember
21 Officer Laureano told you, even if it's not verbatim, but
22 all of the information he gave you concerning this
23 information from Mr. Hemingway?

24 A. Not verbatim, but generally it was that there was
25 one or possibly two firearms either just recently placed or

1 being in the process of being placed in or around the
2 abandon car in the rear of 297 Enfield Street.

3 Q. And what did you do when you received this
4 information?

5 A. We responded to that address.

6 Q. Who is "we"?

7 A. Myself and Officer O'Hare.

8 Q. In one patrol car?

9 A. Correct.

10 Q. Where was Mr. Hemingway when you departed to go to
11 Enfield Street?

12 A. He was with Officer Laureano.

13 Q. Where physically?

14 A. I don't remember exactly where.

15 Q. You indicated at one point he was in the rear of
16 Officer Laureano's patrol car, correct?

17 A. Correct.

18 Q. Was he in the rear of Officer Laureano's patrol
19 car when you departed from the encounter with
20 Officer Laureano and Mr. Hemingway?

21 A. I don't remember exactly.

22 Q. Well, when in the course of your arrival and
23 before your departure at Garden Street was Mr. Hemingway in
24 the rear seat of Officer Laureano's patrol car?

25 A. I couldn't tell you exactly. Again, it was a long

1 vicinity of your patrol car?

2 A. That's because dispatch really has no need to know
3 exactly what we're doing at that moment.

4 Q. Fair enough. And when you decided to go to
5 297 Enfield Street, did you coordinate with anyone else, a
6 supervisor, another officer, regarding your desire to go to
7 that location on Enfield Street?

8 A. I don't remember that.

9 Q. Did you at any point, to the best of your
10 recollection, radio to someone to indicate that you were
11 en route to 297 Enfield Street?

12 A. It's possible but I couldn't tell you exactly.

13 Q. So as you sit here now, it's not whether you can
14 tell me exactly, you have no recollection of having done
15 that one way or the other, right?

16 A. Correct.

17 Q. And you arrived at 297 Enfield Street at some
18 point after 3:00 p.m., correct?

19 A. Correct.

20 Q. The time that's indicated is 322 hours, does that
21 signify the time that you arrived or some later time?

22 A. I don't recall.

23 Q. Who was driving when you got to Enfield Street?

24 A. Again, I don't recall.

25 Q. Well, who were the possible people who could have

1 been driving, including yourself?

2 A. Well, there was myself and Officer O'Hare in the
3 car, so it was one of the two of us.

4 Q. All right. And where did you pull up when you
5 arrived at 297 Enfield Street?

6 A. I don't know exactly where we parked, but I
7 believe we parked just a few houses north of the location.

8 Q. And is 297 Enfield Street near the intersection of
9 any other streets?

10 A. It is.

11 Q. What street is it near?

12 A. I would have to look at a map to tell you exactly,
13 but I believe it's just south of Westland and just north of
14 I believe it would be Rockville.

15 Q. Winchester?

16 A. Winchester.

17 Q. Would Winchester be north or south of the
18 location?

19 A. I would have to look at a map to tell you exactly.
20 It's in the vicinity.

21 Q. Fair enough. Did you get out of the vehicle
22 somewhere on Enfield Street?

23 A. Yes, I did.

24 Q. Did you observe Officer O'Hare get out of the
25 vehicle on Enfield Street?

1 A. Yes.

2 Q. Did you have a warrant to go onto the property of
3 297 Enfield Street?

4 A. No, we did not.

5 Q. And as you're sitting here now, after you got out
6 of your vehicle on Enfield Street, did you radio in to
7 anyone about your arrival and about your departure from your
8 vehicle on Enfield Street?

9 A. I don't recall.

10 Q. Is it likely, based on your practice, procedure
11 and training, that you would have, or is it likely that you
12 did not make any communication to any other officer about
13 your leaving your vehicle?

14 A. Can you restate that?

15 Q. Yeah. Is it more likely that you did or more
16 likely that you did not communicate to either dispatch or
17 another officer that you were leaving your vehicle and
18 investigating on Enfield Street?

19 A. It's more likely that we did not.

20 Q. And why not?

21 A. Because we wouldn't want anybody else to come
22 through again and interrupt the possibility of somebody
23 being back there hiding the firearms.

24 Q. Are you telling us then, under oath today, that
25 the information that you had was that the placing of

1 the guns had possibly not yet occurred and that you
2 might actually interrupt the actual transaction of
3 somebody placing or retrieving guns at that moment of
4 your arrival?

5 A. My impression was that there could have been a
6 possibility that we might interrupt this individual.

7 Q. And where did you go when you got to 297 Enfield
8 Street?

9 A. We walked up the north side of the house.

10
11 [Plaintiff's Exhibit 2: Marked for
12 identification.]
13

14 BY MR. SCHOENHORN:

15 Q. Now, I'm going to show you what has been marked as
16 Exhibit 2. And it's amazing what satellite imagery now is
17 able to do. Do you recognize the house that's in red that's
18 in the center of Exhibit 2?

19 A. I don't recognize it from this view. If you're
20 telling me that that's the address, then I'll believe you.

21 Q. All right. In any event, would you be able to
22 trace the route that you traveled once you arrived at that
23 address?

24 A. Do you want me to trace it with a pen or do you
25 want me to just show you?

1 Q. Well, first of all, can you indicate which way you
2 went? Obviously, you came back again but would you be able
3 to trace the route you went? And you went towards the
4 backyard, correct?

5 A. Correct.

6 Q. Would you be able to on that photograph indicate
7 which side of the house where you went from the front yard
8 and which side of the house you went on?

9 A. Yes, I can indicate that.

10 Q. All right. Here's a Sharpie, if you want to just
11 draw right on the --

12 MR. GERARDE: Can I ask just you, are you
13 asking him to start at the sidewalk and draw his
14 path?

15 MR. SCHOENHORN: Correct. Not his way back.

16 MR. GERARDE: To the farthest point he got
17 into the backyard before he turned around?

18 MR. SCHOENHORN: Yes.

19 MR. GERARDE: Can you do that?

20 THE WITNESS: I can tell you what side of the
21 house we went on. I don't remember if we entered
22 through the driveway or the gate.

23 BY MR. SCHOENHORN:

24 Q. Okay. But you did cross on the front yard of that
25 property?

1 A. Yes.

2 Q. So if you don't remember if you went from the
3 driveway or from the gate, why don't you start at the gate
4 with the understanding that it might have been further up
5 from the driveway. How's that?

6 MR. GERARDE: So on the front lawn as if he
7 came from the gate?

8 BY MR. SCHOENHORN:

9 Q. Yes, start from the point you do remember at the
10 very least you were present, even if you don't remember
11 which entrance you came in from?

12 A. Okay, I don't want to start from the gate if
13 that's not what I remember, but I will start from where I
14 remember.

15 Q. Yes, start from where you remember.

16 A. Okay.

17 Q. All right. You drew such a straight line I'm not
18 sure I can tell that it's not part of the picture. Would
19 you at least put an arrow at the end of the line so we know
20 which direction you were going?

21 MR. GERARDE: Do you know what he means by
22 that?

23 THE WITNESS: Yes.

24 BY MR. SCHOENHORN:

25 Q. Just a caret for an arrow, like you would on a

1 motor vehicle --

2 A. Yes, right.

3 Q. All right. So you have drawn a line with some
4 carets that indicate to the side of the house as you're
5 facing the house it would be the right side of the house as
6 you face it from the street, correct?

7 A. Correct.

8 Q. And your testimony is that that's the north side
9 of the property?

10 A. That would be the north side, yes.

11

12 [Plaintiff's Exhibit 3: Marked for
13 identification.]

14

15 BY MR. SCHOENHORN:

16 Q. Now, I'm going to show you another satellite
17 picture, Exhibit 3, and ask you whether or not this
18 picture -- and I realize that it's a little bit dark but
19 that's the best I can do with this type of view from the
20 satellite. Would you be able to indicate on Exhibit 3 the
21 location with an X as to how far you came up the side of the
22 property before you turned around?

23 A. The picture is really bad.

24 MR. GERARDE: Do you have your bearings? You
25 have to see where the street is.

1 MR. GERARDE: Four total, two are connected?

2 BY MR. SCHOENHORN:

3 Q. Right. Do you see that?

4 A. Yes, I do.

5 Q. In using the window on that level that's the
6 farthest to the right, are you able to explain where you
7 were in relation to that window, obviously you were on the
8 ground but in relation to the distance to the back of the
9 house?

10 A. I would say I was somewhere between that window
11 and the corner of the house.

12 Q. Okay. Did you ever circle into the rear of the
13 yard at any time?

14 A. I did not make it to the rear of the yard.

15 Q. Who came into the yard first, you or
16 Officer O'Hare?

17 A. Officer O'Hare was ahead of me when we -- let me
18 clarify that. Officer O'Hare was ahead of me when we walked
19 along the north side of the house. I don't know who came
20 into the yard initially first.

21 Q. Fair enough. How far ahead was Officer O'Hare
22 than you as you walked along the north side of the house?

23 A. Approximately, several feet.

24 Q. Would several feet be less than 10 feet?

25 A. Yes, less than 10 feet.

1 MR. GERARDE: While he's approaching the
2 backyard?

3 BY MR. SCHOENHORN:

4 Q. While you were approaching the backyard?

5 A. While we were approaching the backyard, we could
6 hear movement in the backyard.

7 Q. Did you hear any voices?

8 A. Did not hear voices.

9 Q. Did you hear any barking?

10 A. Did not hear any barking at that time.

11 Q. When you said you heard movement, can you describe
12 it in any more detail?

13 A. Not really. Just a rustling. Something moving in
14 the backyard.

15 Q. Did you ever reach a point along the side of that
16 house where you were able to have a clear view of the
17 backyard of that residence as you were heading there behind
18 Officer O'Hare?

19 A. A partial view.

20 Q. And what did you observe?

21 A. We observed a large dog.

22 Q. Where did you observe it?

23 A. I don't remember exactly where the dog was but I
24 remember it was facing us.

25 Q. Describe the dog?

1 A. From my report here, I have a large brown and
2 white dog.

3 Q. From after the fact do you recall that it was a
4 St. Bernard?

5 A. I do recall that, yes.

6 Q. And do you recognize it as a St. Bernard, the type
7 of dog that you see in these movies that are in the Swiss
8 Alps with barrels under their necks, right?

9 A. I guess you could say that.

10 Q. It wasn't the first time you had ever seen a
11 St. Bernard?

12 A. No, it was not.

13 Q. You didn't think it was a Pit Bull, did you?

14 A. No, I didn't think it was a Pit Bull.

15 Q. Do either of these photographs, either Exhibit 3,
16 2 or 4, show the spot where you first observed the dog?

17 MR. GERARDE: Where the dog was when he first
18 saw it?

19 BY MR. SCHOENHORN:

20 Q. Yes, where the dog was when you first observed
21 it?

22 A. I can give you a general area, I can't pinpoint it
23 exactly.

24 Q. All right. First of all, what picture are you
25 referring to?

1 A. The easiest picture for me to see it, would be
2 picture 4.

3 Q. Can you describe anything in this picture that
4 would help pinpoint the location where the dog was, unless
5 you know the exact spot?

6 A. I don't know the exact spot, but again you have a
7 grassy area in the rear of the house. You have, what, about
8 four garbage cans lined up in this picture. I would say the
9 dog was in the grassy area somewhere between the house and
10 those garbage cans.

11 Q. On the north side of the yard closer to the side
12 you were entering on rather than from the driveway side,
13 which we agreed is on the south side, right?

14 MR. GERARDE: I don't know if you could say
15 closer from this photograph. He can describe
16 where it is, you can see where the grass meets the
17 driveway.

18 BY MR. SCHOENHORN:

19 Q. Let me see the color picture for a second. Okay.

20 Could you point to the approximate area that
21 you first observed the dog?

22 A. It was somewhere in this area.

23 Q. So there's some kind of a white -- it's hard to
24 tell in this picture, there's a white rectangle that seems
25 to be partially on the pavement and partially on the grass,

1 A. I believe we observed the dog pretty much
2 simultaneously.

3 Q. And what did you do when you saw the dog?

4 A. Ran.

5 Q. So I assume you first turned around?

6 A. Correct.

7 Q. Now, before you turned and ran, did you hear the
8 dog?

9 A. Let me see. Yeah, the dog did advance towards us
10 while growling. I think that's what initially set the
11 running off.

12 Q. And describe what you mean by advancing towards
13 you?

14 A. Began to walk in our direction.

15 Q. And you turned and ran?

16 A. Officer O'Hare yelled "run" to me pretty much
17 simultaneously as I was turning to run.

18 Q. And tell me where did you run?

19 A. I ran what would be eastbound back along the north
20 side of the house.

21 Q. And where did you go?

22 A. When I reached the front of the house, I began to
23 run that would be kind of southeast, across the front of the
24 yard.

25 Q. Did you go out where the driveway is?

1 A. I did go towards the driveway, yes.

2 Q. Did you go out to where the driveway is?

3 A. I believe I made it to about the driveway and the
4 sidewalk area.

5 Q. Was it your intention to keep running towards
6 Winchester Street if you had to?

7 A. I would have kept running, yes.

8 Q. Okay. And as you were running, did you turn
9 around at all?

10 A. I did.

11 Q. And what did you observe when you turned around?

12 A. I observed the dog was right on Officer O'Hare.

13 Q. Describe what you mean by right on him. Was he
14 physically on him?

15 A. No, it was very close behind him and it was
16 snapping at him.

17 Q. And did you stop running to observe this?

18 A. I slowed down somewhat while looking over to see,
19 you know, obviously to make sure Officer O'Hare was okay.

20 Q. What was Officer O'Hare doing?

21 A. He was yelling to the dog to get back.

22 Q. Did he have anything in his hands while he was do
23 doing that?

24 A. We both had our firearms in our hands at the
25 time.

1 Can I restate that? At the time, he was not
2 registered. If he was prior, I don't know.

3 Q. Okay. And as you were looking back and you saw
4 Officer O'Hare shouting to the dog, what did you next
5 observe yourself?

6 A. I didn't observe O'Hare actually fire the shots
7 but I did hear the shots, turned, and saw the dog drop.

8 Q. Did you continue to run towards Winchester Street
9 even after you had turned and looked?

10 MR. GERARDE: The first time you mean?

11 BY MR. SCHOENHORN:

12 Q. The first time?

13 A. Yes, I was continuing to run but my pace was
14 slowing down. Again, you know, if I had to go back and
15 assist Officer O'Hare and put myself in jeopardy with the
16 dog I would have.

17 Q. The dog had stopped or had slowed down as it
18 approached Officer O'Hare, is that correct, as he faced the
19 dog?

20 A. At one point he was facing the dog, I don't
21 remember seeing the dog stop myself.

22 Q. Well, Officer O'Hare wasn't running in reverse,
23 was he, like backwards at any point?

24 A. I believe he was back-pedaling.

25 Q. Did you see the dog jump on Officer O'Hare?

1 Q. Yes, the ones that would actually go to the edge
2 of the fence as opposed to where the fence -- you see the
3 fence ends there?

4 A. Correct, I was on the driveway side of those.

5 Q. Okay. Had you gone over the curb of the driveway,
6 and you see there's a little area, space, between those
7 walkway stones and the curb, raised curb, of the driveway?
8 Had you gotten over onto the pavement of the driveway is my
9 question?

10 A. I don't remember that exactly.

11 Q. And when you heard the shots, what did you do?

12 A. I was looking back, I heard the shots, I saw the
13 dog fall on the ground and I stopped running.

14 Q. And how much time was there between each of the
15 shots?

16 A. Less than a second between each shot.

17 Q. And how many shots did you hear?

18 A. I heard three shots.

19 Q. Is it your testimony that there was no delay
20 between the second and the third shots?

21 A. There was no delay.

22 Q. After the shots, did you hear anybody?

23 A. After the shots, I did see a young girl come out
24 of the front door of the house.

25 Q. Out of the front door of the house?

1 A. Correct.

2 Q. And what did she do?

3 A. She ran up to the dog, she was very upset.

4 Q. Did she say anything?

5 A. I remember her crying and, you know, I don't
6 remember exactly what she had said.

7 Q. Do you remember her saying any words at all?

8 A. She was saying things, I don't -- I couldn't tell
9 you exactly what she was saying.

10 Q. Do you recall her saying, Don't shoot my dog?

11 A. I don't recall that, no.

12 Q. Now, you testified that you saw the dog like
13 gnarling and leaping towards Officer O'Hare, correct?

14 A. I would say snapping. His jaw was snapping.

15 Q. And where was he snapping towards?

16 MR. GERARDE: What part of O'Hare, do you
17 mean?

18 MR. SCHOENHORN: Yes.

19 BY MR. SCHOENHORN:

20 Q. Well, in the report you say his leg?

21 A. Yeah, well, it was snapping towards his legs, you
22 know, when O'Hare was running.

23 Q. So isn't it true this dog, when it stands normal
24 on its four legs, the head is higher than Officer O'Hare's
25 legs?

1 vehicles at 297 Enfield Street?

2 A. I don't remember seeing any abandoned vehicles,
3 no.

4 Q. After the shots were fired, did you see any
5 abandoned vehicles at 297 Enfield Street?

6 A. I do not remember seeing any abandoned vehicles at
7 any point during that incident on that date.

8 Q. Did you attempt to determine whether there were
9 any abandoned vehicles on the property before you entered
10 that property?

11 A. Can you restate that again?

12 Q. Yes. Did you attempt to determine whether
13 there were any abandoned vehicles at that location before
14 you entered the property at 297 Enfield Street; that is,
15 from a public area, the street or the back side of the
16 street?

17 A. No, we did not do anything other than what I said
18 when we walked up.

19 Q. Why didn't you?

20 A. Well, if there was an individual back there in
21 the process of hiding the guns and we pulled up front and
22 looked down the driveway, we would have probably scared them
23 away.

24 Q. Well, you're saying would have this. Are you
25 telling me that, as you sit here today, that you believe the

1 information that was conveyed to you is that there was a
2 person about to place a firearm at that location and that's
3 why you went there immediately after your conversation with
4 Officer Laureano?

5 A. We believed there was a possibility that we could
6 possibly interrupt somebody in the process of it, yes.

7 Q. Did you observe that there was a "Beware of Dog"
8 sign in the front of the house in at least one location
9 before you entered the property?

10 A. I did not observe it prior to entering the
11 property.

12 Q. Did you observe it after you entered the
13 property?

14 A. No, I did not. I see it's in the pictures there
15 so . . .

16 Q. You never observed it, is what you're saying?

17 A. Not until the pictures, no.

18 Q. So not until today is what you mean?

19 A. Correct.

20 Q. Did this house look to you that it was occupied at
21 the time?

22 A. I couldn't say whether it was or wasn't.

23 Q. Let me ask it a different way. Did the house
24 appear to you to be an abandoned property, a vacant,
25 abandoned property on December 20th, 2006?

1 that area, then I would say yes.

2 Q. Did you make a determination that the owners or
3 occupants of 297 Enfield Street did not have an expectation
4 of privacy in their side or rear yard on December 20th,
5 2006?

6 A. Based on the way the property was set up, I would
7 say no, they did not.

8 Q. Tell me what you mean by that. How was it set up
9 that made you think they didn't have an expectation of
10 privacy?

11 A. There was many openings around the yard. The
12 driveway was not fenced off, the gate was not closed, and I
13 didn't see any no trespassing signs or anything to the
14 effect to keep people out of the property.

15 Q. What do you mean there were openings in the
16 property? What do you mean by that?

17 A. Throughout the fenced-in area there were several
18 openings in the fence. I think you can even see from this
19 picture, and I don't know if we have better pictures, of
20 there might actually be a part of the fence that's actually
21 bent over or down in one part of the yard. And there's a,
22 to the best of my recollection, a gap in this corner, which
23 would be the southwest corner of the yard, which I know that
24 individuals from that area use as a cut in the past. And
25 when I say cut, I refer to an area where they would pass

1 through or use as a shortcut while walking through the rear
2 yards.

3 Q. And you had been in that yard before
4 December 20th, 2006, to determine that before you entered;
5 is that correct?

6 A. I have seen people cut through that yard before,
7 yes. I do not recall personally being on the property
8 myself.

9 Q. Well, you just pointed, and I'm going to have you
10 describe where you believe there were holes in the fence, I
11 want to know how you determined that before you entered the
12 property on December 20th, 2006, so you could make the
13 conclusion you made?

14 A. Well, as you approached, it was immediately
15 obvious that the entire driveway was open, the front gate
16 was open. And as we approached along the side of the house,
17 you could see the damage to the fence on that side.

18 Q. Are you telling us that there were holes in the
19 fence on the north side of the building?

20 A. To the best of my recollection, yes.

21 Q. And point to, on any of these pictures, the spot
22 where you claim there were holes in the fence?

23 A. I couldn't tell you exactly where they were. And
24 I don't know when this picture was taken either.

25 Q. Well, I'm not asking whether you can see them in

1 this picture, I'm asking you to tell me -- you made a
2 determination why there was no expectation of privacy on
3 that day, so you obviously had to have known before you
4 entered the property that there were holes in the fence so
5 that it wasn't private.

6 MR. GERARDE: Object to the form.

7 MR. SCHOENHORN: I understand that. I didn't
8 ask the question yet.

9 BY MR. SCHOENHORN:

10 Q. So would you please point to the places that
11 you claim that you had observed holes in the yard in the
12 fence before you entered the property on December 20th,
13 2006?

14 A. Well, I didn't observe that -- prior to
15 entering the property, we observed the front, which was
16 wide open.

17 Q. You're talking about where the driveway is,
18 correct?

19 A. Correct.

20 Q. And that's indicated in Exhibit 6, correct?

21 A. This is not a view of the whole front, but yes.

22 MR. GERARDE: I think Exhibit 2 shows it a
23 little better.

24 THE WITNESS: Do you have any other pictures
25 of the front?

1 BY MR. SCHOENHORN:

2 Q. Well, not of the driveway. There was a gate,
3 was there not, to the front of that house as shown in
4 Exhibit 5?

5 A. Yes, there is a gate in that photo. But the gate
6 was opened when we approached.

7 MR. SCHOENHORN: I'll note that Mr. Harris
8 has to leave so he is departing at this time.

9
10 [Glen Harris left the deposition room.]

11
12 THE WITNESS: There should be evidentiary
13 crime scene photos that would show an accurate
14 depiction of the front of the house from that
15 day.

16 BY MR. SCHOENHORN:

17 Q. Have you seen those photographs?

18 A. I have not seen those photographs, but I know they
19 were taken.

20 Q. And how long were you at the scene after the
21 shooting?

22 A. I don't recall the exact amount of time.

23 Q. Who did you speak to after the shooting regarding
24 the shooting?

25 A. I couldn't tell you exactly who I spoke to.

1 STATE OF CONNECTICUT :
2 : SS
3 COUNTY OF NEW HAVEN :

4 I, SANDY K. VISENTIN, a Registered Professional
5 Reporter and Notary Public duly commissioned and qualified
6 in and for the State of Connecticut, do hereby certify that
7 pursuant to notice there came before me on June 3, 2009, the
8 following-named person to wit: ANTHONY PIA, who was by me
9 duly sworn to testify to the truth and nothing but the
10 truth; that he was thereupon carefully examined upon his
11 oath and his examination reduced to writing under my
12 supervision; that this transcript is a true record of the
13 testimony given by the witness.

14 I further certify that I am neither attorney nor
15 counsel for nor related to nor employed by any of the
16 parties to the action in which this deposition is taken; and
17 further, I am not a relative or employee of any attorney or
18 counsel employed by the parties hereto, or financially
19 interested in this action.

20 IN WITNESS THEREOF, I have hereunto set my hand
21 and affixed my seal this 12th day of June, 2009.

22 *Sandy K. Visentin*

23 Sandy K. Visentin
24 LSR, RPR and Notary Public
25 CT Lic. #SHR.234

My Commission Expires:
August 31, 2011

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A. *
as guardian for K.H., a minor child *
Plaintiffs *

vs. *

JOHNMICHAEL O'HARE, *
ANTHONY PIA and *
CITY OF HARTFORD *
Defendants *

CIVIL ACTION NO.
3:08CV01644 (RNC)

JUNE 15, 2009

COPY

DEPOSITION
OF
JOHNMICHAEL O'HARE

Taken before Sandy K. Visentin, Registered Professional Reporter and Notary Public in and for the State of Connecticut, pursuant to the Federal Rules of Civil Procedure, at the Law Offices of Jon L. Schoenhorn & Associates, LLC, 108 Oak Street, Hartford, Connecticut, on Monday, June 15, 2009, commencing at 1:06 p.m.

Sandy K. Visentin, LSR, RPR
CT Lic. #SHR.234
Andrews Reporting Service
330 Cook Hill Road
Cheshire, CT 06410
(203) 271-2190

1 A. Sergeant Sean St. John.

2 Q. Now, how was it that you came to be at 297 Enfield
3 Street on December 20th of 2006?

4 A. Investigating a firearms complaint.

5 Q. Let's back up, then. Tell me how it was that you
6 had information that led you to investigate a firearms
7 complaint?

8 A. We were conducting an arrest in another incident,
9 and the party who was arrested informed us that he could get
10 us two guns. And information led us to believe that there
11 was two guns at 297 Enfield.

12 Q. When you say there was a party arrested, was that
13 party already under arrest?

14 A. Yes, he was.

15 Q. Did you participate in the arrest of that
16 individual?

17 A. I believe I did, yes.

18 Q. First of all, we're talking about George
19 Hemingway, correct?

20 A. Correct.

21 Q. Did you review any police reports regarding
22 George Hemingway today?

23 A. I reviewed the arrest warrant of George Hemingway.

24 Q. How many pages was that?

25 A. I would have to see it again but I believe it was

1 A. We were driving back to -- actually, we were
2 driving to the hospital and I saw a party that we
3 recognized as George Hemingway and his street name
4 was Pimp, and I knew he was a gang member with the
5 Wes Hell gang out of Westland Street. He was in front
6 of 717 Garden, which we know as a Wes Hell hangout, so
7 I identified that.

8 Saw him standing out front. As soon as he
9 looked at our cruiser, he dropped something quickly and
10 walked away, started walking south on Garden Street.

11 Q. You keep using the term "we," I assume that's not
12 the royal we?

13 A. No.

14 Q. It's not the literary we?

15 A. No.

16 Q. Can you tell me who the other person or persons
17 you were with at the time that said this occurred with
18 Mr. Hemingway on Garden Street?

19 A. Officer Laureano, he was my partner.

20 Q. Do you remember which vehicle you were in?

21 A. I would have to review the report.

22 Q. Well, looking at Exhibit 1, look down to the
23 fourth line, it mentions Hartford Police cruiser 232?

24 A. That sounds about right. We shared five cruisers
25 amongst the unit. Oh, no, I see here --

1 A. I knew he had been convicted and served time.

2 Q. So he was then a convicted felon, as far as you
3 knew?

4 A. As far as I knew.

5 Q. And you also, as far as you knew, believed him to
6 be a member of a street gang?

7 A. Yes.

8 Q. And was that street gang known to you to be a
9 violent street gang?

10 A. Yes.

11 Q. Involving guns and weapons?

12 A. Yes.

13 Q. Was it also known to you to be a street gang that
14 involved the trafficking in narcotics?

15 A. Yes.

16 Q. Any other particular crimes that this particular
17 gang was known for?

18 A. Homicide.

19 Q. Do you have any reason to believe that
20 Mr. Hemingway himself was involved in a homicide as of that
21 date, as of December 20th, 2006?

22 A. As of -- no.

23 Q. I'm not asking about subsequent.

24 A. Right. No.

25 Q. And any time after December 20th, 2006, did you

1 ever have occasion to encounter Mr. Hemingway again?

2 A. Since then have I?

3 Q. Since then.

4 A. Yes.

5 Q. Were you involved at all in the arrest of
6 Mr. Hemingway for the charges for which he is currently
7 being held in lieu of bond?

8 A. No.

9 Q. Did you ever, subsequent to December 20th,
10 2006, participate in the actual physical arrest of
11 Mr. Hemingway?

12 A. No, I did not.

13 Q. So after you observed Mr. Hemingway drop
14 something and walk away on December 20th, 2006, what did
15 you do next?

16 A. Officer Laureano stated, What is that? Jumped
17 out, walked over to it, and it was heroin.

18 Q. When you say it was heroin, describe what you
19 saw?

20 A. It was packaged. I remember it was in a plastic
21 bag, packaged heroin. I don't recall the exact amount, but
22 it was more than one.

23 Q. And you observed him drop this right there on the
24 sidewalk?

25 A. Absolutely.

1 Q. He didn't run away?

2 A. He didn't run away, he started to walk.

3 Q. Where did he go?

4 A. Started walking south on Garden Street.

5 Q. What did you do, then?

6 A. Either I or Laureano told him to stop, I don't
7 know which one, and he complied.

8 Q. And were you still in the police car at that
9 time?

10 A. No, we stepped out.

11 Q. Both of you stepped out?

12 A. I can't testify for Officer Laureano but I stepped
13 out.

14 Q. Were driving or were you the passenger on that
15 day?

16 A. I believe I was the passenger. I'm not sure.

17 Q. You stepped out and did what?

18 A. I walked over and saw the heroin.

19 Q. I thought you just told me that Officer Laureano
20 stepped out and picked something up and said to you that it
21 was heroin?

22 A. No. He observed him drop it and said, He just
23 dropped something. And I went over and observed that it was
24 heroin.

25 Q. Then what did you do?

1 was handcuffed behind his back or in front?

2 A. I don't recall.

3 Q. Did you have any conversation with Mr. Hemingway
4 yourself?

5 A. I don't believe so.

6 Q. Did you hear him say anything to Officer Laureano?

7 A. I don't recall exact words but I know there was a
8 conversation.

9 Q. I'm not asking whether you knew there was
10 conversation, I'm asking whether you heard Mr. Hemingway say
11 anything to Mr. Laureano?

12 A. Well, I understood the question. I know
13 they were engaged in conversation, that's as far as I
14 remember.

15 Q. So as you're sitting here, you would not be able
16 to testify to anything that Mr. Hemingway said, right?

17 A. No, it's all third-party from Officer Laureano.

18 Q. Well, that's my question. You didn't hear
19 anything that he said?

20 A. No, I don't recall.

21 Q. You do recall them engaging in conversation?

22 A. Yes.

23 Q. Did the conversation occur after Mr. Hemingway
24 was in the police car or before he was placed in the police
25 car?

1 A. I don't recall. I know there was a continuing
2 conversation.

3 Q. And after there was a conversation of some
4 type between Mr. Hemingway and Officer Laureano, did
5 Officer Laureano then convey something to you?

6 A. Yes.

7 Q. Tell me what Officer Laureano said to you?

8 A. Without using exact words, because I'm not
9 exactly sure, but he said that he could get two guns for
10 us.

11 Q. "He" being who?

12 A. George Hemingway.

13 Q. All right. And what else did Officer Laureano say
14 to you?

15 A. He told me that -- no, George made a phone call.
16 I remember George made a phone call standing with
17 Officer Laureano. And Gabe said he's dialing up two guns
18 right now.

19 Q. Did you see Mr. Hemingway making a phone call?

20 A. Yes, I did.

21 Q. Whose phone did he use?

22 A. I'm not exactly sure.

23 Q. Did he use Officer Laureano's phone?

24 A. I'm not exactly sure.

25 Q. I take it if he was making a phone call then he

1 in the rear of the address on Vineland Terrace during this
2 entire time you're waiting there?

3 A. As we were waiting for Quan?

4 Q. Yes.

5 A. No, because we were out on the other side of the
6 house taking a look at the street to see if he was walking
7 down from his house that we knew to be on Auburn Street and
8 if he was walking to the house. We could view him. There
9 was a lattice on the front porch; we were behind the lattice
10 looking through.

11 Q. Did you hear a cell phone ring?

12 A. I don't recall.

13 Q. Did you observe Mr. Hemingway speaking a second
14 time on a cell phone?

15 A. Not a second time I don't believe, no.

16 Q. Well, the first time was the conversation
17 purportedly with Quan Morgan, that you were waiting for him
18 to arrive, right?

19 A. I believe so, yes.

20 Q. My question is, you had Officer Laureano tell
21 you, oh, change of plans, Mr. Morgan called back.
22 Did you see Mr. Hemingway speaking to anyone else a second
23 time?

24 A. Not that I recall, no.

25 Q. So what exactly did Officer Laureano tell you?

1 A. That the guns were up on Enfield Street,
2 297 Enfield Street. And, in fact, when we regrouped in the
3 backyard, George Hemingway I do remember reiterating it was
4 297 Enfield Street and there was an abandoned car in the
5 backyard.

6 Q. You heard Mr. Hemingway say --

7 A. I remember him saying 297 Enfield Street, yes.

8 Q. All right. Did you know the address of
9 297 Enfield Street?

10 A. No.

11 Q. Had you ever been in that yard before?

12 A. I may have, not that I recall. I worked that
13 neighborhood for a while. I don't know every specific
14 address of every house I go into or go in the backyards
15 of.

16 Q. Okay. Tell me again when you became a police
17 officer?

18 A. 2005, June 1st.

19 Q. So you had been a police officer for less than
20 18 months at the time of this incident, correct?

21 A. Correct. My entire time in the Northeast
22 neighborhood.

23 Q. So I'm going to ask you, do you recall having been
24 in the yard of 297 Enfield Street for any reason prior to
25 December 20th, 2006?

1 Q. Are you sure he's a citizen?

2 A. Am I sure?

3 Q. Yeah.

4 A. Citizen of the city?

5 Q. Citizen of the United States?

6 A. I'm sure he's a citizen of the city.

7 Q. So you received this information. Did you relate
8 it to Officer Pia or was he there when you were --

9 A. He was there.

10 Q. Where were you exactly with Officer Pia?

11 A. Well, we were in the front, the northwest corner
12 and then we moved to the back again, regrouped to the back,
13 the three of us and George Hemingway.

14 Q. And this is definitely not on Garden Street where
15 this was occurring?

16 A. I don't believe so, no. No, it was Vineland
17 Terrace.

18 Q. And he was on the side of the building with you?

19 A. Yes.

20 Q. And Officer Laureano told you that guns were going
21 to be delivered to 297 Enfield Street or that they were
22 already at 297 Enfield Street?

23 A. I think they were being delivered. I can't
24 honestly recall the exact terminology but they were going to
25 be delivered.

1 Q. That's at least what you recall as you sit here
2 now?

3 A. Yes.

4 Q. To the best of your recollection?

5 A. Yes.

6 Q. So what did you do?

7 A. Myself and Officer Pia went up to 297 Enfield
8 Street, and Officer Laureano stayed behind with
9 George Hemingway.

10 Q. Now, were there any other officers present at that
11 time when you left Vineland Street -- Vineland Terrace, I
12 mean?

13 A. I don't believe so. I know many of our officers
14 on our unit were tied up on a call that happened prior to
15 that on Rockville Street.

16 Q. What kind of call was that?

17 A. That was a car chase, crash.

18 Q. Who was driving the unit that went to Enfield
19 Street?

20 A. I don't know. I don't recall.

21 Q. Well, did you have keys to that unit?

22 A. No. But I could have been driving. I don't
23 know. It was Officer Pia's vehicle, I'm assuming he was
24 driving.

25 Q. But you don't recall?

1 A. I don't recall.

2 Q. So what did you do when you headed towards
3 297 Enfield Street?

4 A. We drove -- I'm not exactly sure how we drove. I
5 know we parked north of the house fearing, you know, because
6 we discussed the fact it could be a setup, an ambush, or
7 there still could be somebody there.

8 Q. Well, how far up did you park?

9 A. About a house maybe, two houses north of it.

10 Q. And this was a marked patrol car?

11 A. Yes.

12 Q. So your testimony is that you're going to
13 expect somebody maybe to drop off firearms and you parked
14 a marked patrol car one house up in plain sight on
15 Enfield Street?

16 A. Yeah, I'm not exactly sure of our route of
17 travel. We didn't want to park directly in front of the
18 house.

19 Q. So you parked one house up?

20 A. I would say one or two. I don't know the
21 exact address but it was north of there. I know it was
22 far enough north that we didn't believe that it would be
23 seen.

24 Q. How large are the lots on Enfield Street?

25 A. I don't believe they are very large.

1 Q. You parked in the same block as 297 Enfield
2 Street?

3 A. Yeah, I believe it's the same block.

4 Q. Did you park on the same side of the street as
5 297 or did you park on the opposite side of the street?

6 A. I believe we parked on the same side.

7 Q. Were you in uniform?

8 A. Yes, I was.

9 Q. Was Officer Pia in uniform?

10 A. Yes, he was.

11 Q. Tell me what you did?

12 A. We exited the vehicle, we walked south, we
13 identified the house, we saw it, proceeded cautiously
14 through the front open gate, and we proceeded to walk north
15 and then up along the north side of the house, which is like
16 a narrow passageway.

17 Q. And it's a passageway between what and what?

18 A. There's a small, probably waist high, chainlink
19 fence and the house.

20 MR. GERARDE: Can you have the record
21 reflect what's on the right and what's on the
22 left?

23 THE WITNESS: The north side is chainlink
24 fence and the south side is the house.

25

1 Q. Now, in your report on Exhibit 1, it
2 states here that you parked in front of it looks like
3 305 Enfield Street. Do you see that? It's about six
4 lines down. The second to the last line of that first
5 paragraph.

6 A. Yes, I see that, 305.

7 Q. How far is 305 Enfield Street from 297 Enfield
8 Street?

9 A. I don't know. A house or two, maybe three.

10 Q. And how long did it take you to get from your
11 vehicle to the front of 297 Enfield Street on foot?

12 A. Probably less than 30 seconds, I'm not sure.

13 Q. Now, the next sentence states that there was
14 a partial fence in front of the house but there was no
15 gate in front of the driveway or front walkway. Do you
16 see that?

17 A. I do.

18 Q. Can you tell me what you meant by a partial
19 fence?

20 A. Well, it went across, it stopped at the gate, the
21 gate was open, and then it went across to the driveway and
22 there was absolutely no way of stopping or blocking the
23 driveway. It was a wide driveway, it was unfenced or
24 unchained.

25 Q. I just want to be clear. It says there was no

1 gate in front of the front walkway. That's inaccurate,
2 correct?

3 A. Right.

4 Q. There was a gate, it's just that it was open,
5 correct?

6 A. Correct. As I wrote the report, I see that that
7 was not clear.

8 Q. Okay, and that's why I'm trying to get it
9 clarified.

10 A. Okay.

11 Q. In any event, you entered the front walkway?

12 A. Yes.

13 Q. You didn't close the gate behind you?

14 A. I didn't see why we would, no.

15 Q. And you went around to the right as you faced the
16 house, correct?

17 A. Correct.

18 Q. Now, was there a fence on the right side of the
19 property?

20 A. There was the same style chainlink fence on the
21 right side of the property.

22 Q. That went all of the way to the back of the
23 property, correct?

24 A. I don't know how far it went back.

25 Q. Well, it went at least as far back as you were

1 walking, correct?

2 A. I believe so.

3 Q. And as you went in that space between the house
4 and the fence, how far would you say you got towards the
5 rear of the property?

6 A. I got right to the back of the house.

7 Q. So the corner of the house?

8 A. Correct.

9 Q. As we're sitting here now, would that be the
10 northwest corner?

11 A. That would be the northwest corner, yes.

12 Q. And what did you observe from that location?

13 A. Well, I mean, we stopped short just in case there
14 was anybody in the backyard or there was, you know, an
15 ambush. And I peeked around the corner and I saw in the
16 southwest corner I saw a bunch of looked like a wooden fence
17 but I think they were propped against the fence, and I saw a
18 dog come out from a piece of fence that was attached or
19 pushed against the fence or something and I saw him come out
20 in the southwest corner. And he was startled, he looked
21 directly at us.

22 Q. What you could see from that corner, was there
23 either a building or fencing around the backyard?

24 A. My focus was directly at the dog, I don't recall
25 what else I saw.

1 right?

2 A. Yeah, kind of under the teepee section of it.

3 Q. And you say teepee, it was on an angle?

4 A. Correct.

5 Q. And so there was a place between whatever the
6 wooden fence was leaning against and the leaning fence
7 itself?

8 A. I would so, yes.

9 Q. And it came out and you said it saw you?

10 A. Yes.

11 Q. How do you know that the dog saw you?

12 A. Because it came out and it stopped, it was
13 alerted. It looked directly at our location.

14 Q. When you say our location, where was Officer Pia
15 in relation to you?

16 A. He was right on my back.

17 Q. So you don't know if he was able to observe what
18 you saw?

19 A. I don't know what he saw, no.

20 Q. Have you talked to him at all about the
21 circumstances of this incident?

22 A. Yes, I have.

23 Q. Have you talked to him recently?

24 A. I would say recently, yes.

25 Q. Did he tell you about his deposition?

1 A. He told me a piece of it, yes.

2 Q. What did he tell you?

3 A. He just said he saw the dog in the middle of the
4 yard.

5 Q. In the middle of the front yard?

6 A. He said when he looked in the back he saw it in
7 the middle of the backyard.

8 Q. Okay. So the dog came from behind the fence, and
9 how far did it approach you before you turned around and
10 left the corner?

11 A. Like I said, it stopped, it looked at us and then
12 it immediately became -- it rushed in rage right at us, so I
13 turned around immediately.

14 Q. What do you mean by raged at you?

15 A. Well, it stopped, it looked at us, and then I just
16 heard like a low growl, like grrrrrr, and it just shot right
17 at us and came at us. I mean, it was a split-second
18 reaction, I turned and yelled Dog, run.

19 Q. And where did you run?

20 A. We ran back along the side of the house towards
21 the front yard.

22 Q. Did you run out the same way you came in?

23 A. Yes, I did. I ran out to the front yard the same
24 way. I ran up the front, up the same alleyway.

25 Q. And when you got to the front, did you go out the

1 gate?

2 A. I don't recall because I remember telling
3 Officer Pia to hit the fence, and then I remember turning
4 around and seeing the dog come around the corner. I was
5 in the front yard and I could hear it, I could feel it,
6 I remember looking back when I was running, it was
7 gaining on us. I turned around in the front yard -- I
8 mean, I heard it so I wanted to turn to face it because I
9 didn't think I could outrun it, and I turned around and I
10 saw it and it was coming around the front corner of the
11 house.

12 Q. And what did you do then?

13 A. It came at me. It was coming around the corner
14 of the house. As I turned around, I drew my service
15 revolver -- service pistol, I'm sorry, I was walking
16 backwards, yelling out. I was trying to startle the
17 dog to buy some time, hoping it would stop. I
18 started yelling, Get back. I was screaming, Get back,
19 get back, get back. Not that I thought a dog would
20 understand that, but I figured maybe I could scare it a
21 little bit.

22 It momentarily, like, hesitated, it stopped
23 for a second, and then it just started twisting its head,
24 and there was like a low growl, like a dog would do when it
25 was about to attack. It started, you know -- I don't know

1 how to make the noise for her but it was turning its head,
2 it was snapping its teeth and it was growling, it was coming
3 to get me.

4 Q. And then what did you do?

5 A. I waited until I was on top, I knew I had to shoot
6 down at it. If it kept coming, I knew I would have to shoot
7 and I didn't want to shoot straight ahead. So as it came at
8 me, it jumped and I just remember going tat-tat-tat, three
9 times, really fast.

10 MR. SCHOENHORN: Let's go off the record for
11 a second.

12
13 [Briefly off record.]

14
15 BY MR. SCHOENHORN:

16 Q. When you said for Officer Pia to hit the fence,
17 what does that mean?

18 A. Jump the fence, basically. I mean, I don't
19 recall why I -- I know what I meant when I said it,
20 I remember saying it because I remember saying hit the
21 fence. In my terminology, I was telling him to jump over
22 that fence.

23 Q. You were behind him, correct?

24 A. Correct.

25 Q. Did you follow him over the fence?

1 A. I don't even know if he made it over the fence,
2 but no, I did not follow him over the fence.

3 Q. Did you go out the gate?

4 A. No, I turned around in the front yard and he
5 was right there. I didn't have time to make it out of the
6 gate.

7 MR. GERARDE: I missed the pronoun, he said
8 he was right there.

9 BY MR. SCHOENHORN:

10 Q. Who was right there?

11 A. The dog.

12 Q. What kind of dog was it? Describe it?

13 A. I later found out it was a St. Bernard. It was
14 just a large brown and white dog.

15

16 [Plaintiff's Exhibit 5: Marked for
17 identification.]

18

19 BY MR. SCHOENHORN:

20 Q. Now, I'm going to show you what's been marked as
21 Exhibit 5 and I'm going to ask you whether or not this
22 picture shows the location where you stopped and turned
23 around and faced the dog?

24 A. The location is in here, yes, it was close to the
25 front walkway here.

1 Q. Right. Would you be able to put the letter J
2 where you were standing where you stopped and faced the dog
3 and drew your service weapon?

4 A. I honestly don't recall exactly where I was, so
5 could draw you a big J that will cover a larger area, but I
6 don't remember specifically where I was standing. I recall
7 walking backwards over this sidewalk. It happened so fast I
8 can't tell you exactly where I was when certain events
9 transpired.

10 Q. Well, I guess the question is can you tell me
11 why you didn't go out the gate if you were walking
12 backwards?

13 A. Because there was no way I could have outrun that
14 dog.

15 Q. But you said it stopped?

16 A. It stopped momentarily probably for maybe half
17 a second to a second, and I'm not going to go on the
18 assumption that that's it, game over, and turn my back to
19 it.

20 Q. Well, when you said you were moving backwards, you
21 weren't moving back at a running speed, were you?

22 A. No, I was stepping backwards.

23 Q. When you were yelling at it and saying get back,
24 whatever you were saying to it, had you already stopped at
25 that moment or were you moving backwards?

1 A. No, I was moving backwards.

2 Q. And would this photograph, Exhibit 5, show where
3 you were when you shot the dog? .

4 A. I could tell you it was somewhere in here. That's
5 all I really could tell you.

6 Q. Even if it's a broad area, if you could just draw
7 a big circle that would cover the area where you were when
8 you shot?

9 A. Probably somewhere in that neighborhood, I'm
10 assuming.

11 Q. All right. So I want to be clear, you believe
12 it's possible you were as far as the front walkway when you
13 shot?

14 A. I passed the front walkway because I remember
15 crossing over the walkway backwards.

16 Q. There's certainly some area of that photograph
17 that's beyond the area where you were standing when the dog
18 was shot, correct?

19 A. Like I said, I can't give you an exact. I don't
20 know if I'm still standing on it. I know there was at one
21 point cement under my feet so I'm not going to go on the
22 assumption that I was just in the yard, but I know I was
23 somewhere in this neighborhood. I still could have had my
24 toes on the sidewalk, I don't know.

25 Q. And where was the dog?

1 A. The dog was only a few feet away from me at that
2 point.

3 Q. When you shot the dog, did it go down right where
4 it was or did it keep moving?

5 A. No, it stopped instantaneously. I can't say that
6 the momentum didn't carry it somewhere or not, I don't know.
7 But when I shot the dog, it instantaneously hit the ground
8 and stopped.

9 Q. It's your testimony, and I want to be clear about
10 this, all three shots were fired, one right after another
11 without --

12 A. Rapid succession.

13 Q. Rapid succession was the word I was looking for.

14 A. Yes, sir.

15 Q. Or two words I was looking for. Is that correct?

16 A. Yes, sir, it was pop pop pop.

17 Q. Could you also just put your initials on this
18 photograph.

19 A. [Witness complying].

20 Q. When you entered the yard, did you see any signs
21 on the house, such as No Trespassing or Beware of Dog or
22 anything like that?

23 A. I know there was a Beware of Dog from looking at
24 photographs. I don't recall at that time if I saw it or
25 not.

1 other than what you told us about your belief that that
2 wasn't the curtilage to go in to the front and around to the
3 side of the house that led you to believe that you did not
4 need a warrant to enter the property? Or have you told me
5 everything?

6 A. Well, I mean, we thought we maybe would catch him
7 in the act of laying down weapons, a concern about public
8 safety, the fact that he was dropping two guns.

9 Q. Who is "he"?

10 A. Quan Morgan. The fact that he was leaving two
11 guns, that was our primary concern. And, no, we
12 didn't believe we needed a warrant for the fact that we
13 thought it was being put in an abandoned car in the
14 backyard.

15 Q. Now, you said you reviewed the warrant that was
16 prepared in this case for George Hemingway, correct?

17 A. I have, yes.

18 Q. And did it mention anything about guns or Quan
19 Morgan?

20 A. Not that I recall. I would have to look at it
21 again but I don't believe so.

22 Q. Did you see any report from December 20th, 2006,
23 that talked about a Quan Morgan?

24 A. No. And I understand the reason for that, as I
25 stated before.

1 Q. What is the reason for that?

2 A. The fact that we did not want to give an arrest
3 report to the court that a lawyer would get and subsequently
4 a fellow gang member might get their hands on, which is
5 common practice, revealing Hemingway to be a snitch, putting
6 him in jeopardy.

7

8 [Plaintiff's Exhibit 6: Marked for
9 identification.]

10

11 BY MR. SCHOENHORN:

12 Q. I'm going to show you Exhibit 6. I'm going to
13 ask whether or not this photograph -- first of all, can
14 you tell that it's the front of 297 Enfield Street as
15 taken from the driveway, from the street side of the
16 property?

17 A. It appears to be, yes.

18 Q. All right. And does this photograph show the
19 location where you were standing when you shot the
20 plaintiff's dog?

21 A. As I stated before, I believe so because I
22 believe that was the side of the yard but I can't say
23 definitively.

24 Q. How close was the dog to you when you shot it?

25 A. It was right on top of me. Three feet, probably,

1 at the most.

2 Q. Was it 3 feet directly in front of you?

3 A. It was directly in front of me.

4 Q. And where was your back facing?

5 A. My back was facing the driveway.

6 Q. So you were facing north?

7 A. I was facing direct north, I would say.

8 Q. And your back was due south?

9 A. Yes, sir.

10 Q. And can you tell me what angle were you holding
11 your service revolver?

12 A. I was holding it down.

13 Q. Would it be 90 degrees?

14 A. No.

15 Q. 45 degrees?

16 A. More likely 45.

17 Q. Again, assuming a flat -- let's say straight
18 across would be either zero degrees or 180 degrees, let's
19 say zero --

20 A. Right.

21 Q. -- and 90 being perpendicular to the ground --

22 A. Yes.

23 Q. -- you would have held it 45 degrees, about
24 halfway between even and straight down?

25 A. I can't say definitively the degree, but it was

1 pointed down to the ground, to the dog, as close as it was
2 to me.

3 Q. But the dog wasn't under you?

4 A. It wasn't directly under me, but he was close to
5 me.

6 Q. He wasn't close enough so that when you put your
7 service revolver out that you were within an inch of his
8 mouth?

9 A. I can tell you it happened so fast I don't know.
10 I know it was 3 feet when I made the decision, and it
11 was charging so I don't know where it ended up and where
12 he was when the shots went off, but he was 3 feet and
13 closing.

14 Q. Did you assess your background before you shot
15 this dog?

16 A. I know I made a conscious decision to shoot down
17 so everything would go into the ground.

18 Q. And all three were in repeated succession at that
19 time, correct?

20 A. Right. Rapid succession, yes.

21 Q. Rapid succession. Can you show me now on
22 Exhibit 6 the location where you shot the dog?

23 A. I can give you the same circle I gave you on the
24 other one. I'm not exactly sure.

25 MR. GERARDE: Are you asking for where he was

1 in relation between the fence and the house?

2 A. Yeah, I believe I was somewhere right around the
3 middle of the yard there.

4 Q. Can you explain how the dog is on an angle if you
5 were backing straight up, as you testified, with your back
6 facing south?

7 A. It charged straight at me and when I fired my
8 weapon I continued back. I don't know what happened to it
9 or how it ended up at that angle. Momentum could have
10 carried it that way, I have no idea.

11 Q. The dog was not in the air when you shot it?

12 A. It was coming at me. I believe it's front paws
13 were off the ground, although I can't recall specifically.
14 I went into, you know, flight or fight mode, I was
15 protecting myself so I can't recall.

16 Q. Okay. And do you see the gate to the fence in
17 this photograph is open? Do you see that?

18 A. I do see that, yes.

19 Q. Is that the way it was when you entered the
20 property at 297 Enfield Street?

21 A. Yeah, I believe so. I don't believe we pushed
22 open a gate.

23 Q. So can you explain to me why you didn't go out the
24 same gate that you came in?

25 A. Well, I wasn't really paying attention at that

1 point to where I could get -- I knew I couldn't outrun the
2 dog so I was doing everything in my power to scare it. Even
3 if I had gone out that gate, there was no way I was
4 outrunning that dog.

5 Q. But Officer Pia was able to out run it, correct?

6 A. Well, Officer Pia was in front of me, correct.
7 And the dog seemed to focus his attention on me at that
8 point.

9 Q. Well, explain to me how you knew where he was
10 focusing his attention?

11 A. Because he was looking right at me and charging
12 right at me.

13 Q. And how much time did you spend looking back
14 towards the dog to know that?

15 A. A few seconds.

16 Q. While you were running you were looking back?

17 A. I looked back once, I remember glancing over my
18 shoulder to see if it was still coming.

19 Q. For a couple of seconds?

20 A. No, a quick glance. I ran, looked back, saw it
21 and kept running forward.

22 Q. So I guess what I'm not certain of here is when
23 you say he was focusing on you, is this after you had turned
24 to face the dog?

25 A. Yes. I heard it -- I heard it, I felt -- I mean,

1 it was almost like I felt it coming behind me, I turned
2 around and it was right there.

3 Q. And what do you mean you felt it coming?

4 A. Well, I could hear it barking, snapping.

5 Q. You heard it snapping?

6 A. Well, I heard it ahrrrrr, like that. I mean, I
7 can't really --

8 Q. Growling?

9 A. Growling. But it was in an aggressive manner,
10 definitely.

11 Q. Could you give me an example of a time when you
12 heard a dog growling in a nonaggressive manner?

13 A. Absolutely. I have a dog. A play dog, I hear it
14 all of the time.

15 Q. What kind of dog do you have?

16 A. This one I could hear growling, I could hear it
17 and it was really very quickly, like rharrrr, rharrrr, rharrrr,
18 like that kind of a growl. I knew that wasn't a friendly
19 come here, boy.

20 Q. Okay. And what kind of dog do you own?

21 A. I own a Boston terrier.

22 Q. What did you do after you shot the dog?

23 A. I remember I shot quickly and I continued backing
24 up, the dog dropped instantaneously. And then I remember
25 looking over to my right, which would be the east side, and

1 shoulder and saw the dog approaching faster than you could
2 run?

3 A. Probably.

4 Q. Did you tell Officer Agostino in words to the
5 effect that you feared being bitten or mauled by the dog's
6 teeth?

7 A. Once again, I can't recall what I said exactly but
8 I probably said something to that effect.

9 Q. Did you tell Officer Agostino on that date that
10 the dog lunged at you?

11 A. Same answer, I don't recall. But probably
12 something to that effect because that's what happened.

13 Q. Did you say something to the effect that you drew
14 your service weapon and fired directly at the dog while you
15 were approximately 3 feet away from it?

16 A. Probably something very similar to that, yes, if
17 not that.

18 Q. How long did you stay at the scene after the
19 shooting?

20 A. Not very long.

21 Q. Why not?

22 A. Because my hand was ripped open from the prior
23 incident, I had to go to the hospital.

24 Q. I'm not sure I understand that. You were injured
25 at the time you went to this call?

1
2 CROSS-EXAMINATION
3

4 BY MR. GERARDE:

5 Q. Officer O'Hare, I have in front of you Exhibit 6.
6 You, I believe, have already identified this as the house at
7 297 Enfield Street where this incident took place; is that
8 right?

9 A. I believe it's 297 Enfield, yes.

10 Q. And we can see on the left side of this photograph
11 that there's a driveway that associates with that house; is
12 that right?

13 A. Yes.

14 Q. And although there's a vehicle in this photograph,
15 there was no vehicle on that day?

16 A. I don't believe so. I believe that all we saw was
17 a dumpster.

18 Q. Okay. And from the sidewalk looking down the
19 driveway, you can see into the rear yard; is that right?

20 A. From the sidewalk looking down the driveway?

21 Q. Yes.

22 A. Well, there was a dumpster there. I don't believe
23 we could see the entire backyard.

24 Q. All right. Was there anything preventing you from
25 walking down that driveway into the backyard, such as a

1 fence or a gate?

2 A. No.

3 Q. All right. And you can see in this Exhibit 6 that
4 there is a fence towards the right side of the photograph,
5 and that runs parallel to the sidewalk as you look at it in
6 this exhibit?

7 A. Yes.

8 Q. And was there anything preventing you from
9 walking across the front lawn and heading north and
10 traveling along the north side of that house into the
11 backyard?

12 MR. SCHOENHORN: Object to the form.

13 BY MR. GERARDE:

14 Q. Such as fence or a gate?

15 A. No.

16 MR. SCHOENHORN: Object to the form.

17 THE WITNESS: No, certainly not.

18 BY MR. GERARDE:

19 Q. And that's, in fact, what you did?

20 A. I believe we went through the front gate and went
21 up the north -- through the front gate right here.

22 Q. All right. And Exhibit 8 is a photograph of the
23 very rear part of the north side of that house; is that
24 right?

25 A. I believe so, yes.

1 Q. Okay. And this fence that you can see on the
2 right side of the photograph, I think you called it
3 chainlink, but that's the type of fence that was on the
4 north side of the property; is that right?

5 A. From what I recall, yes.

6 Q. All right. So there was nothing that would stop
7 anyone in either home at 297 Enfield Street or the home on
8 the other side of that fence from seeing what was happening
9 in each other's back yards; is that correct?

10 A. Correct.

11 MR. GERARDE: Those are all my questions,
12 thank you.

13 MR. SCHOENHORN: Just a follow-up on that.

14

15

16 REDIRECT EXAMINATION

17

18 BY MR. SCHOENHORN:

19 Q. The questions about the side of the house
20 with the driveway on it, the side of the house that you
21 walked up is the opposite side where the driveway was,
22 correct?

23 A. Yes.

24 Q. And the fence that you were walking along
25 that's depicted in part in Exhibit 8 went all of the way

1 STATE OF CONNECTICUT :
2 : ss
3 COUNTY OF NEW HAVEN :

4 I, SANDY K. VISENTIN, a Registered Professional
5 Reporter and Notary Public duly commissioned and qualified
6 in and for the State of Connecticut, do hereby certify that
7 pursuant to notice there came before me on June 15, 2009,
8 the following-named person to wit: JOHNMICHAEL O'HARE, who
9 was by me duly sworn to testify to the truth and nothing but
10 the truth; that he was thereupon carefully examined upon his
11 oath and his examination reduced to writing under my
12 supervision; that this transcript is a true record of the
13 testimony given by the witness.

14 I further certify that I am neither attorney nor
15 counsel for nor related to nor employed by any of the
16 parties to the action in which this deposition is taken; and
17 further, I am not a relative or employee of any attorney or
18 counsel employed by the parties hereto, or financially
19 interested in this action.

20 IN WITNESS THEREOF, I have hereunto set my hand
21 and affixed my seal this ____ day of _____, 2009.

22
23 Sandy K. Visentin
24 LSR, RPR and Notary Public
25 CT Lic. #SHR.234

My Commission Expires:
August 31, 2011

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A. *
as guardian for K.H., a minor child *
Plaintiffs *

vs. *

JOHNMICHAEL O'HARE, *
ANTHONY PIA and *
CITY OF HARTFORD *
Defendants *

CIVIL ACTION NO.
3:08CV01644 (RNC)

JUNE 15, 2009

COPY

DEPOSITION
OF
GABRIEL LAUREANO

Taken before Sandy K. Visentin, Registered Professional Reporter and Notary Public in and for the State of Connecticut, pursuant to the Federal Rules of Civil Procedure, at the Law Offices of Jon L. Schoenhorn & Associates, LLC, 108 Oak Street, Hartford, Connecticut, on Monday, June 15, 2009, commencing at 3:30 p.m.

Sandy K. Visentin, LSR, RPR
CT Lic. #SHR.234
Andrews Reporting Service
330 Cook Hill Road
Cheshire, CT 06410
(203) 271-2190

1 A. As far as I remember, that's how it happened, I
2 think, yes.

3 Q. It wasn't Officer O'Hare who suggested changes, is
4 it?

5 A. No.

6 Q. When you saw Mr. Hemingway on the street loitering
7 and you said something to him, what did he do?

8 A. As far as I remember, he started to walk away and
9 we started driving away. I don't remember.

10 Q. Did you observe Mr. Hemingway with any narcotics
11 in his possession on that day, December 20th, 2006?

12 A. From what I remember, I think he tried to be
13 discreet and throw it down as he was walking away.

14 Q. Well, is that something you saw or Officer O'Hare
15 saw?

16 A. I remember seeing it, I don't remember what John
17 saw or what he said he saw. But I remember seeing it.

18 Q. Seeing him doing what?

19 A. Kind of nonchalantly throw something down.

20 Q. And who got out of the patrol car as you were
21 driving away?

22 A. I don't remember.

23 Q. Well, who went over to see what he dropped?

24 A. I don't remember but I'm sure we probably all did.
25 I don't remember who.

1 Q. And when you say all, I mean, I know there was you
2 and there was Officer O'Hare?

3 A. Yes.

4 Q. Was there anybody else there at the time?

5 A. Well, you mentioned earlier that Pia was with
6 us.

7 Q. Well, I don't know if he was with you. At some
8 point he was driving unit 232. I'm trying to get the
9 sequence of when maybe somebody showed up or who was present
10 when things were going on?

11 A. I don't remember Pia, so I remember being with
12 O'Hare and going over to where George was standing.

13 Q. And you picked up what had been dropped on the
14 ground?

15 A. I don't remember who did but, yeah, somebody
16 picked it up.

17 Q. Were they plastic bags that you saw, baggies?

18 A. I have to review it. It was, yes, some heroin
19 bags.

20 Q. You just reviewed this a few days ago, right?

21 A. Yes.

22 Q. I mean, I'll show it to you but I'm trying to see
23 if you remember what's in the document that you just looked
24 at a couple of days ago?

25 A. I know. I work midnights so I'm spent actually.

1 Q. Now, did this conversation about no
2 promises take place on the street or in the back of your
3 patrol car?

4 A. I don't remember.

5 Q. In the next paragraph it says, and follow along,
6 "Hemingway informed me that there were two small caliber
7 firearms under the driver's seat of an abandoned Nissan
8 Maxima in the rear yard of 297 Enfield Street." Do you see
9 that?

10 A. Yes.

11 Q. And then the next sentence says, "Hemingway
12 would not say how he knew about the firearms." Do you see
13 that?

14 A. Yes.

15 Q. Is that accurate what you typed here or reported
16 here?

17 A. As far as I remember.

18 Q. And, again, you wrote up the affidavit, or did
19 someone else do it for you?

20 A. I believe I should have written this, yes.

21 Q. Okay. So the information was that there were two
22 small caliber firearms that were under the driver's seat of
23 an abandoned Nissan Maxima, correct?

24 A. Correct.

25 Q. And that he told you that they were in the rear

1 STATE OF CONNECTICUT :
2 : SS
3 COUNTY OF NEW HAVEN :

4 I, SANDY K. VISENTIN, a Registered Professional
5 Reporter and Notary Public duly commissioned and qualified
6 in and for the State of Connecticut, do hereby certify that
7 pursuant to notice there came before me on June 15, 2009,
8 the following-named person to wit: GABRIEL LAUREANO, who
9 was by me duly sworn to testify to the truth and nothing but
10 the truth; that he was thereupon carefully examined upon his
11 oath and his examination reduced to writing under my
12 supervision; that this transcript is a true record of the
13 testimony given by the witness.

14 I further certify that I am neither attorney nor
15 counsel for nor related to nor employed by any of the
16 parties to the action in which this deposition is taken; and
17 further, I am not a relative or employee of any attorney or
18 counsel employed by the parties hereto, or financially
19 interested in this action.

20 IN WITNESS THEREOF, I have hereunto set my hand
21 and affixed my seal this 30th day of June, 2009.

22 *Sandy K. Visentin*

23 Sandy K. Visentin
24 LSR, RPR and Notary Public
25 CT Lic. #SHR.234

My Commission Expires:
August 31, 2011

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 10, 2009

AFFIDAVIT OF OFFICER JOHN MICHAEL O'HARE

I, John Michael O'Hare , being duly sworn, depose and say:

1. I am over 18 years of age;
2. I believe in the obligations of oath;
3. That the statements herein are based upon personal knowledge;
4. That I am currently employed by the City of Hartford Police Department and have been so employed since December 2004;
5. That I am familiar with the plaintiffs' complaint dated October 28, 2008;
6. That after I was informed that there were two guns that were placed, or about to be placed, in an abandoned vehicle located in the back yard of 297 Enfield Street, Hartford, CT, I was concerned for the public safety, wanted to get guns off the street and possibly catch the suspect stashing the guns;
7. That 297 Enfield Street is a large multi-family house that is painted red and white;
8. That along the edge of the front yard of 297 Enfield Street was an approximate 4 foot high chain link fence with multiple openings;

9. That photograph 1 attached to this affidavit depicts the 4 foot high chain link fence with multiple openings along the edge of the front yard of 297 Enfield Street;

10. That the chain link fence along the front of 297 Enfield Street had a large opening where the driveway was located;

11. That photograph 2 attached to this affidavit depicts the chain link fence along the front of 297 Enfield Street that had a large opening where the driveway was located;

12. That there was a gate in the chain link fence, which was open;

13. That photograph 3 attached to this affidavit depicts the gate in the chain link fence, which was open;

14. That there was no fence or barrier blocking ones view of or path of travel to either the front yard or back yard of 297 Enfield Street;

15. That photographs 4a and 4b attached to this affidavit shows that there was no fence or barrier blocking ones view of or path of travel to either the front yard or back yard of 297 Enfield Street;

16. That there was a portion of fencing on the side of 297 Enfield Street that was knocked down;

17. That photograph 5 attached to this affidavit depicts the portion of fencing on the side of 297 Enfield Street that was knocked down;

18. That there was no fence or barrier separating the front yard from the backyard at 297 Enfield Street;

19. That photographs 4a and 4b attached to this affidavit shows that there was no fence or barrier separating the front yard from the backyard at 297 Enfield Street;

20. That there were no "No trespassing" signs or anything to that effect to keep people out of 297 Enfield Street;

21. That at the time I entered 297 Enfield Street, I did not observe any individuals on the property or in the area;

22. That before entering the back yard to 297 Enfield Street, I saw the dog, turned around and ran;

23. That the dog was gaining on me, and I determined that the dog was not going to stop and that I could not outrun the dog;

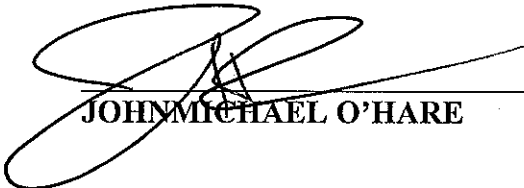
24. That I believed that even if I made it to the driveway, the dog would have continued to chase me and I knew that I could not outrun the dog;

25. That after making every effort to outrun the dog and get the dog to stop by yelling "get back", I was left with no other choice than to shoot the dog, as I believed that it was about to attack me;

26. That the entire sequence of events, from the time we first saw the dog to the time the first shot was fired, took approximately 5 seconds, but no more than 10 seconds; and

27. That at all relevant times on December 20, 2006, I was in the course of performing my official duties as a Hartford Police officer.

Dated at Hartford, Connecticut, this 10 day of August, 2009.



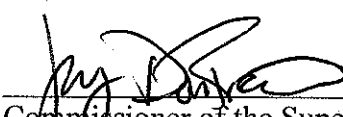
JOHN MICHAEL O'HARE

STATE OF CONNECTICUT)

) ss: Hartford

COUNTY OF HARTFORD)

Subscribed and sworn to before me this 10th day of August, 2009.



Commissioner of the Superior Court
Jay Don Francisco, Esq.













EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 6, 2009

AFFIDAVIT OF OFFICER ANTHONY PIA

I, Anthony Pia, being duly sworn, depose and say:

1. I am over 18 years of age;
2. I believe in the obligations of oath;
3. That the statements herein are based upon personal knowledge;
4. That I am currently employed by the City of Hartford Police Department and have been so employed since December 2004;
5. That I am familiar with the plaintiffs' complaint dated October 28, 2008;
6. That after I was informed that there were two guns that were placed, or about to be placed, in an abandoned vehicle located in the back yard of 297 Enfield Street, Hartford, CT, I was concerned for the public safety, wanted to get guns off the street and possibly catch the suspect stashing the guns;
7. That 297 Enfield Street is a large multi-family house that is painted red and white;
8. That along the edge of the front yard of 297 Enfield Street was an approximate 4 foot high chain link fence with multiple openings;

9. That photograph 1 attached to this affidavit depicts the 4 foot high chain link fence with multiple openings along the edge of the front yard of 297 Enfield Street;

10. That the chain link fence along the front of 297 Enfield Street had a large opening where the driveway was located;

11. That photograph 2 attached to this affidavit depicts the chain link fence along the front of 297 Enfield Street that had a large opening where the driveway was located;

12. That there was a gate in the chain link fence, which was open;

13. That photograph 3 attached to this affidavit depicts the gate in the chain link fence, which was open;

14. That there was no fence or barrier blocking ones view of or path of travel to either the front yard or back yard of 297 Enfield Street;

15. That photographs 4a and 4b attached to this affidavit shows that there was no fence or barrier blocking ones view of or path of travel to either the front yard or back yard of 297 Enfield Street

16. That there was a portion of fencing on the side of 297 Enfield Street that was knocked down;

17. That photograph 5 attached to this affidavit depicts the portion of fencing on the side of 297 Enfield Street that was knocked down;

18. That there was no fence or barrier separating the front yard from the backyard at 297 Enfield Street;

19. That photographs 4a and 4b attached to this affidavit shows that there was no fence or barrier separating the front yard from the backyard at 297 Enfield Street;

20. That there were no "No trespassing" signs or anything to that effect to keep people out of 297 Enfield Street;

21. That at the time I entered 297 Enfield Street, I did not observe any individuals on the property or in the area;

22. That before entering the back yard to 297 Enfield Street, I saw the dog, turned around and ran;

23. That the entire sequence of events, from the time we first saw the dog to the time the first shot was fired, took approximately 5 seconds, but no more than 10 seconds; and

24. That at all relevant times on December 20, 2006, I was in the course of performing my official duties as a Hartford Police officer.


ANTHONY PLA

STATE OF CONNECTICUT)
COUNTY OF HARTFORD) ss: Hartford

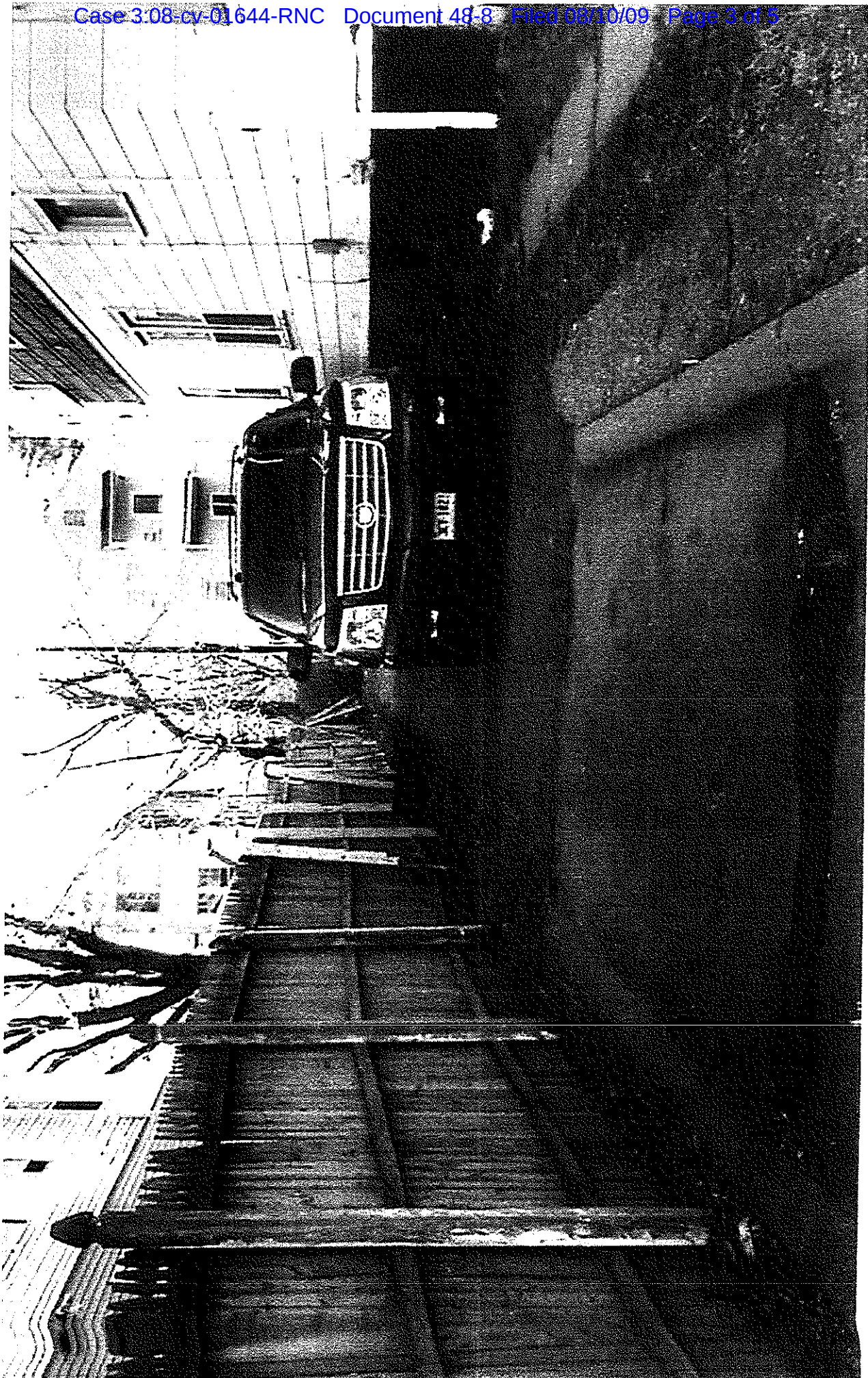
Subscribed and sworn to before me this 6th day of August, 2009.

Commissioner of the Superior Court
Alan R. Dembiczak, Esq.









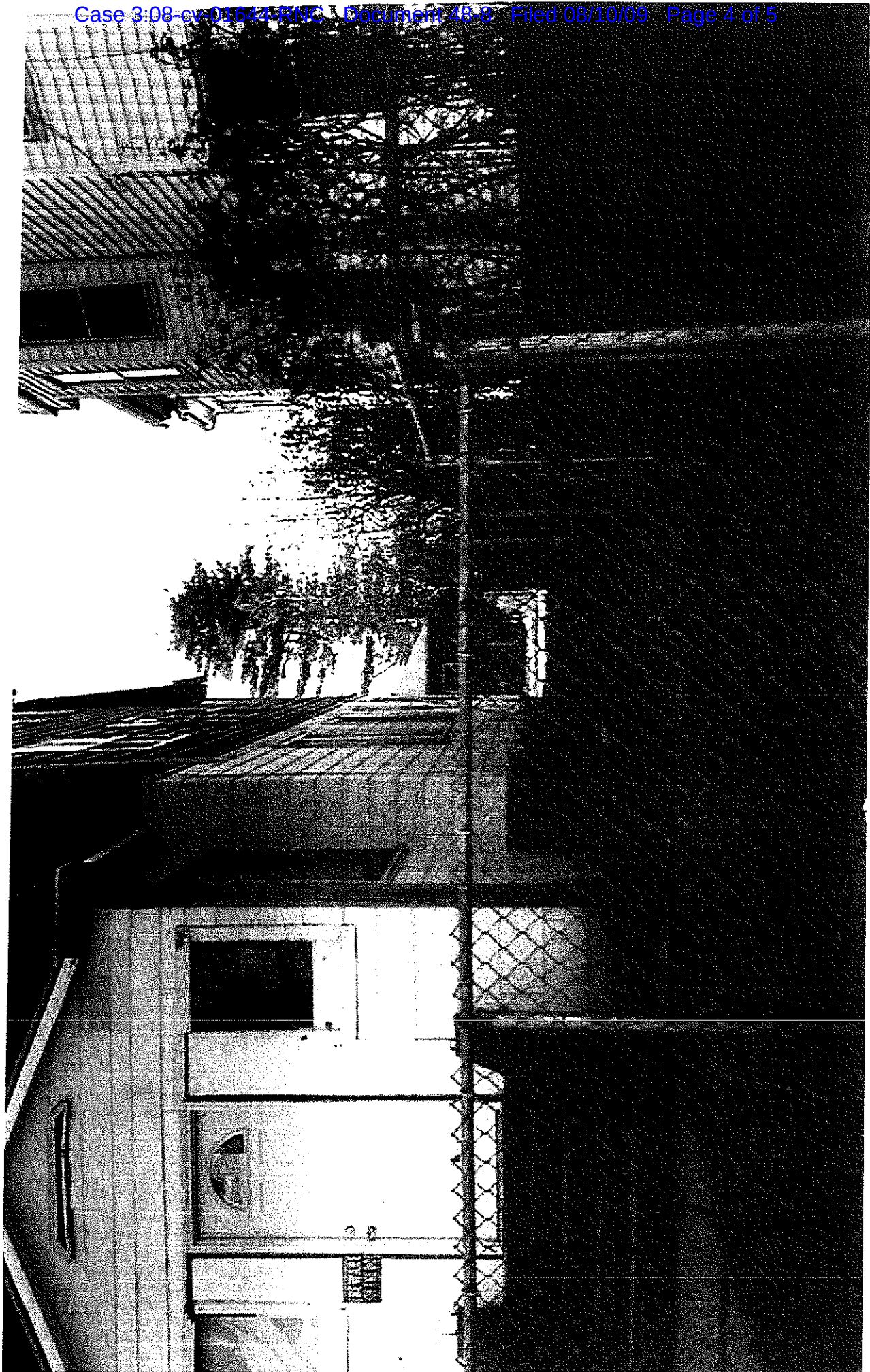




EXHIBIT F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----- x
:
GLEN HARRIS, Individually and PPA as :
Guardian for K.H., a minor child, :
Plaintiffs, : Civil Action No.
:
vs. : 3:08CV01644-RNC
:
JOHNMICHAEL O'HARE, ANTHONY PIA, :
AND CITY OF HARTFORD, : MAY 6, 2009
Defendants. :
:
----- X

DEPOSITION OF GLEN HARRIS

APPEARANCES:

JON L. SCHOENHORN & ASSOCIATES, LLC
Attorneys for the Plaintiffs
108 Oak Street
Hartford, Connecticut 06106-1514
(860) 278-3500
BY: JON L. SCHOENHORN, ESQUIRE
SARA PACKMAN, ESQUIRE

HOWD & LUDORF, LLC
Attorneys for the Defendants
65 Wethersfield Avenue
Hartford, Connecticut 06114-1190
(860) 249-1361
BY: THOMAS R. GERARDE, ESQUIRE

OFFICE OF THE CORPORATION COUNSEL
Attorneys for the City of Hartford
550 Main Street
Hartford, Connecticut 06103
(860) 757-9700
BY: NATHALIE FEOLA-GUERRIERI, ESQUIRE
Assistant Corporation Counsel

ALSO PRESENT: K.H., Plaintiff

NICOLE M. GOSSELIN, R.P.R.
CONNECTICUT LICENSE NUMBER: 00084

1 Q Full time?

2 A Yes.

3 Q As of December 2006, where were you living?

4 A Two ninety-seven Enfield Street in Hartford.

5 Q Did you own that?

6 A Yes.

7 Q Do you own that home?

8 A Yes.

9 Q And who else lived at 297 Enfield Street as of
10 December 2006?

11 A K, me and Tashonna.

12 Q You, K and Tashonna?

13 A Yes.

14 Q Tashonna Ayers?

15 A Yes.

16 Q When did you first purchase 297 Enfield Street?

17 A That was, I believe, in fall of 2003.

18 Q And did you live at 297 Enfield Street up until
19 March of 2008 when you moved over to Barbour Street?

20 A Yes.

21 Q What is K's date of birth, please?

22 A September 1st, 1994.

23 Q During the period of time you lived at 297
24 Enfield Street, which is fall 2003 to March 2008, did K
25 live with you?

1 BY MR. GERARDE:

2 Q Well, if you -- Do you understand what I'm
3 getting at?

4 A When the dogs were in the yard, the backyard is
5 completely fenced in. They were only in the backyard.

6 Q Okay. So what, you would only let the dogs out
7 off leash when they were in a fenced area so that they
8 couldn't, for instance, run into the neighbor's yard?

9 MR. SCHOENHORN: Objection to form.

10 Q Is that correct?

11 A The only way they can go into the neighbor's
12 yard is if they jump the fence.

13 BY MR. GERARDE:

14 Q Okay. And let me ask you about the fence, can
15 you describe how the backyard is fenced in so that when
16 your dogs are let out off leash, they can't get into the
17 neighbor's yard unless they jump the fence?

18 A There is a wooden fence next to a garage. And
19 there is a wooden fence coming down this side of the yard.
20 The only yard they can get into if they jump the fence
21 would be the yard to the right of the backyard.

22 Q Now, what about getting around to the front of
23 your yard, could the dogs do that when they are off leash?

24 A Yes, they can go to the front of the yard.

25 Q How would they do that?

1 A If they went to the front of the yard, they
2 would go down the side of the house opposite to the
3 driveway.

4 Q What about getting onto the driveway, could the
5 dogs get onto the driveway, if they were not on the leash?

6 A Yes, they could.

7 Q How would they do that?

8 A Just walk through the driveway.

9 Q So that the driveway connects to the rear of
10 your yard?

11 A Yes.

12 Q And there is no fence between the grass part of
13 the rear of your yard and your driveway?

14 A No.

15 Q I'm right about that?

16 A Yes.

17 Q So the dogs could actually get out into the
18 street if they were out in the backyard?

19 A If they wanted to, yeah.

20 Q And the way they would do that would be they
21 walk from the backyard over to the driveway and then out
22 into the road; is that correct?

23 A Yes.

24 Q Now, was there any rule that you had as the
25 leader of the home and the owner of the dogs that limited

1 A Yes.

2 Q Both those sides lead to the backyard that you
3 let the dogs go in off leash; is that right?

4 A Yes.

5 Q Okay. Now, we spoke earlier about that if the
6 dogs wanted to, they could get from the back around to the
7 front and out to the driveway?

8 A Yes.

9 Q Could that happen no matter which side of the
10 house they went around?

11 A Generally, the dogs only went to the front on
12 this side of the house.

13 Q The side that's shown in photograph J?

14 A Yes.

15 Q Okay.

16 A Once in a while, when I would play with the
17 dogs, I would run around the house so they would go this
18 way and I would come the other way. And make circles
19 around the house basically.

20 Q Okay. But there was no barrier between the
21 backyard and your driveway?

22 A No barrier.

23 Q So that they could if they wanted to come onto
24 the driveway and come down the side of the house shown in
25 photograph C?

1 A Yes.

2 Q If the dogs came from the backyard down the side
3 of the house shown in photograph J, and therefore got into
4 the front of the yard, could they get onto the driveway
5 from that spot? Or would the fence stop them?

6 A If they came to the front of the yard from the
7 backyard on the side of the house.

8 Q On the side shown in photograph J?

9 A Yes, they could get to the driveway.

10 Q Okay. So I have photograph F in front of you.
11 Does that show how the dogs could get from the side of the
12 house that does not have the driveway over to the driveway
13 if they got to the front yard in photograph F?

14 A Yes.

15 Q So there's no barrier that would prevent the
16 dogs from getting onto the driveway even if they came
17 around the house on the side opposite the driveway?

18 A Yes.

19 Q Okay. And the condition of the various fences
20 that we're looking at in these photographs is the condition
21 they were in as of December 20, 2006 when the police came
22 to your home?

23 A Yes.

24 Q Okay. I notice that at least one of the
25 photographs had a "Beware of Dog" sign seen in the house?

1 A Yes.

2 Q On your cell phone?

3 A Well, I got the phone call and K and Tashonna
4 were on the phone. I can't say who was actually calling.

5 Q So you got one call?

6 A I got one call.

7 Q Now, was your mother present when the police
8 first arrived or did your mother come over afterwards?

9 A When the police first arrived as during the
10 shooting?

11 Q Yes.

12 A It would have been afterwards.

13 Q So the only ones home at the time when the shots
14 were fired were Tashonna and K?

15 A Yes.

16 Q When you spoke to K afterwards, what did she
17 tell you happened?

18 A Basic story that I got was she came home from
19 school, let herself in the house, she was bringing the dogs
20 out so they could go to the bathroom.

21 I don't remember if she had taken Deuce already
22 or not. I don't think she did because I think I had to
23 take him out after the fact.

24 And I think she walked outside with Seven, and
25 Seven went to play with something or other. She was

1 standing outside, and that Seven heard something and bolted
2 toward the front.

3 Q Okay. Did she tell you what part of the
4 backyard she was in when Seven bolted to the front?

5 MR. SCHOENHORN: Object to the form. Are
6 you asking about just in that initial
7 conversation? Or at some later point?

8 MR. GERARDE: That's a good objection.

9 BY MR. GERARDE:

10 Q At that time did she tell you where she was when
11 Seven bolted towards the front?

12 A At that time she did not tell me exactly where
13 she was when he bolted toward the front.

14 Q Did she tell you at that time which side of the
15 house Seven ran around, the driveway side or opposite the
16 driveway side?

17 A Yes, she did.

18 Q What side did Seven bolt towards the front?

19 A He ran down the side of picture M.

20 Q Picture M, which is opposite the driveway?

21 A Yes.

22 Q And did there come a time when you learned where
23 she and the dog, and Seven were right before Seven bolted
24 around towards the front of the house?

25 A Yes. I don't remember exactly, but I believe

1 A Yes.

2 Q Okay. Did she tell you what she did after that?
3 When the dog bolted around to the front of the yard?

4 A When he bolted toward the front of the yard, she
5 ran down -- Is there another photograph over there?

6 Q Oh, sorry. (Handing).

7 A She came down the driveway most likely between
8 the house and the Dumpster to cut him off right here.

9 Q So I take it Seven bolted around the opposite
10 side of the house from the driveway and disappeared from
11 sight?

12 A Mm-hm.

13 Q Is that yes?

14 A She came that way and she came this way.

15 Q So she figured --

16 A She would catch him in the front.

17 Q -- she'd catch him in the front.

18 Did she tell you where she was when the first
19 shot was fired?

20 A I believe, from what she told me, when the first
21 shot was fired, she was still approaching the front of the
22 house.

23 Q Okay. So she wouldn't have -- She was not in a
24 position to see the police when the first shot was fired?

25 A Not to my understanding.

1 MR. SCHOENHORN: Object to the form. I
2 don't --

3 A Not exactly sure what you mean.

4 BY MR. GERARDE:

5 Q Okay.

6 A There is an open area. You can take whatever
7 path you choose.

8 Q Okay. Well, that was my point. They wouldn't
9 have had to jump over a fence in order to get to that side
10 of your house and walk into the backyard; is that correct?

11 A Right.

12 Q Okay. Now, why is it that you have your mail go
13 to your mom's house instead of your home on Enfield Street?

14 A Just there is no mailbox there, and I'm doing
15 work on the house.

16 Q You're doing work on the Enfield Street house?

17 A Yes.

18 Q Do you still own that house?

19 A Yes.

20 Q So that's an investment property for you now?

21 A Yes.

22 Q Is it rented?

23 A No.

24 Q Do you know if Marquette Jones --

25 MS. FEOLA-GUERRIERI: Jenkins.

1 STATE OF CONNECTICUT :

2 ss.

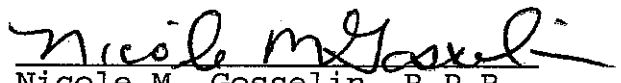
3 COUNTY OF HARTFORD :

4
5 I, Nicole M. Gosselin, R.P.R., a Notary
6 Public for the state of Connecticut, do hereby certify that
7 the deposition of GLEN HARRIS, was taken before me pursuant
8 to the Federal Rules of Civil Procedure, at the offices of
9 Howd & Ludorf, LLC, 65 Wethersfield Avenue, Hartford,
10 Connecticut, commencing at 10:20 a.m., on Wednesday, May 6,
11 2009.

12 I further certify that the witness was first
13 sworn by me to tell the truth, the whole truth, and nothing
14 but the truth, and was examined by counsel, and his
15 testimony stenographically reported by me and subsequently
16 transcribed as hereinbefore appears.

17 I further certify that I am not related to
18 the parties hereto or their counsel, and that I am not in
19 any way interested in the event of said cause.

20 Dated at Hartford, Connecticut, the 27th day
21 of May, 2009.

22 
23 Nicole M. Gosselin, R.P.R.
24 Notary Public

25 My Commission Expires December 31, 2011

EXHIBIT G

----- X
:
GLEN HARRIS, Individually and PPA as :
Guardian for K.H., a minor child, :
Plaintiffs, : Civil Action No.
:
vs. : 3:08CV01644-RNC
:
JOHNMICHAEL O'HARE, ANTHONY PIA, :
AND CITY OF HARTFORD, :
Defendants. : MAY 6, 2009
:
----- X

APPEARANCES:

OFFICE OF THE CORPORATION COUNSEL
Attorneys for the City of Hartford
550 Main Street
Hartford, Connecticut 06103
(860) 757-9700
BY: NATHALIE FEOLA-GUERRIERI, ESQUIRE
Assistant Corporation Counsel

NICOLE M. GOSSELIN, R.P.R.
CONNECTICUT LICENSE NUMBER: 00084

1 don't know, I could have stopped it somehow, and I should
2 have.

3 Q You heard your dad say that, well, your dad
4 testified as to how you reported what happened to him, and
5 one of the things he said was that you were out in the
6 backyard with Seven before Seven then bolted around to the
7 front?

8 A Yes.

9 Q Is that true?

10 A Yes.

11 Q Okay. And is the reason why you were out in the
12 backyard because you were -- Well, why don't you just tell
13 me what were you and Seven doing in the backyard?

14 A I brought him outside to use the bathroom
15 because we were going to play outside.

16 Q So you took Seven out in the backyard after you
17 got home from school?

18 A Yes.

19 Q And that would be the time when Seven could go
20 to the bathroom?

21 A Yes.

22 Q And then you could hang out with him and play
23 with him?

24 A Yes.

25 It's not only him, though. It was Deuce, too.

1 STATE OF CONNECTICUT :

2 SS.

3 COUNTY OF HARTFORD :

4
5 I, Nicole M. Gosselin, R.P.R., a Notary
6 Public for the state of Connecticut, do hereby certify that
7 the deposition of K.H., was taken before me pursuant to the
8 Federal Rules of Civil Procedure, at the offices of Howd &
9 Ludorf, LLC, 65 Wethersfield Avenue, Hartford, Connecticut,
10 commencing at 10:20 a.m., on Wednesday, May 6, 2009.

11 I further certify that the witness was first
12 sworn by me to tell the truth, the whole truth, and nothing
13 but the truth, and was examined by counsel, and her
14 testimony stenographically reported by me and subsequently
15 transcribed as hereinbefore appears.

16 I further certify that I am not related to
17 the parties hereto or their counsel, and that I am not in
18 any way interested in the event of said cause.

19 Dated at Hartford, Connecticut, the 27th day
20 of May, 2009.

21 
22 Nicole M. Gosselin, R.P.R.
Notary Public

23 My Commission Expires December 31, 2011
24
25

EXHIBIT H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS
individually and P.P.A as guardian for
K.H., a minor child,
Plaintiffs

v.

JOHN MICHAEL O'HARE,
ANTHONY PIA, and
CITY OF HARTFORD,
Defendants

CIVIL ACTION NO. 08-28 P 12 39

308 CV 01644

RNC

OCTOBER 28, 2008

COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a civil rights action for monetary relief brought pursuant to Title 42 U.S.C. §1983, and the Fourth and Fourteenth Amendments to the United States Constitution, alleging violations of civil rights by two municipal officers of the Hartford Police Department. The plaintiff claims that the officers trespassed onto the plaintiff's fenced yard without a search warrant, where one of the defendants shot and killed the family dog in the presence of the plaintiff's then 12 year old daughter. The plaintiff also invokes supplemental jurisdiction of the court regarding Connecticut state constitutional and tort claims.

II. JURISDICTION

2. This action is brought pursuant to Title 42, United States Code §§ 1983 and 1988, and the Fourth and Fourteenth Amendments to the United States Constitution.

3. Subject matter jurisdiction is founded upon Title 28 U.S.C. §§ 1331 and 1343, and the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

aforementioned constitutional provisions.

4. The plaintiff also seeks to invoke supplemental jurisdiction under Title 28 U.S.C. § 1367.

III. PARTIES

5. The Plaintiff, Glen Harris, (hereinafter "Harris") has been at all times relevant to this complaint, a citizen of the United States and a resident of the Town of Hartford, Connecticut. He is the father and guardian of the minor child, K.H. At all relevant times, he was the owner of a single-family residence located at 297 Enfield Street in the City of Hartford.

6. During all relevant times mentioned in this complaint, the Defendants, Johnmichael O'Hare (hereinafter "O'Hare"), and Anthony Pia (hereinafter "Pia"), were municipal employees of the City of Hartford, Connecticut, employed as patrol officers for the Hartford Police Department. Defendants O'Hare and Pia are sued in their individual capacities.

7. The Defendant, City Of Hartford (hereinafter "City"), is a municipal corporation incorporated pursuant to the laws of the State of Connecticut. At all relevant times herein, it employed the Defendants O'Hare and Pia.

IV. FACTS

8. On or about December 20, 2006, Defendants O'Hare and Pia entered the plaintiff's yard at 297 Enfield Street in Hartford, CT without a warrant, and conducted an illegal search. The defendants had no lawful basis or probable cause to enter the plaintiff's property.

9. The plaintiff's property was clearly designated as private property, and enclosed by a fence along the perimeter of the property. The south side of the property was bordered by an

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

opaque wooden fence. Thus, the plaintiff's rear yard constituted the curtilage of the home, and was clearly demarcated so as to notify all persons that the plaintiff and his daughter possessed a reasonable expectation of privacy in their rear yard..

10. At the aforementioned date and time, attached to the front of the plaintiff's house was a sign that stated: "BEWARE OF THE DOG".

11. At the aforementioned date and time, the plaintiff's minor daughter, K.H., was playing with the family Saint Bernard dog, "Seven," when the Defendants O'Hare and Pia walked uninvited and unannounced into the back yard.

12. As the defendants entered the the rear yard, the Saint Bernard barked and approached them.

13. Defendants O'Hare and Pia suddenly turned and ran toward the front of the plaintiff's home, at which point Defendant O'Hare turned around and shot "Seven" in the chest, wounding the dog and causing it to fall to the ground.

14. Defendant O'Hare stood over the wounded dog, as K.H. approached screaming "don't shoot my dog." At that time, O'Hare aimed his department issued service revolver at "Seven's" right temple and fired at point blank range, thereby killing the dog in the presence of the plaintiff's minor daughter.

V. FIRST CAUSE OF ACTION (42 U.S.C. §1983 Illegal Search And Seizure)

15. The Defendants acted individually, jointly and severally, and in conspiracy with one another, and with other Hartford police officers, to deprive the plaintiff and his minor daughter of their clearly established federal constitutional rights to be free from unreasonable searches and

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

seizures, in violation of Title 42 U.S.C. §1983 and the Fourth Amendment to the U.S. Constitution. The illegal nature of the defendants' conduct was clearly established at the time of the incident described herein.

16. Defendant O'Hare, while illegally remaining on the plaintiff's property, unlawfully seized the plaintiff's pet dog by shooting it in the chest and head, without probable cause or other lawful justification, in violation of Title 42 U.S.C. §1983 and the Fourth Amendment to the U.S. Constitution.

17. Defendant Pia failed to prevent Defendant O'Hare from unlawfully shooting the plaintiff's dog, although he possessed a sworn duty to uphold state and federal laws.

VI. SECOND CAUSE OF ACTION (Violation Of The Fourteenth Amendment's Due Process Clause By Defendant O'Hare)

18. The allegations contained in paragraphs 1 through 14 are hereby incorporated by reference as if fully set forth herein.

19. After Defendant O'Hare shot and wounded the plaintiff's Saint Bernard, rendering the dog immobile, he approached the helpless animal, deliberately aimed his service revolver at the dog's head, and executed the animal in the presence of the plaintiff's 12 year old daughter.

20. The actions of Defendant O'Hare as aforesaid were so extreme, callous and outrageous that they fell outside the scope of acceptable police behavior and shocks the conscious of civilized society, in violation of the Fourteenth Amendment to the United States Constitution and Title 42, U.S.C. § 1983.

VII. THIRD CAUSE OF ACTION (State Constitutional Violation, Article I, § 7 By Defendants O'Hare and Pia)

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

21. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

22. The Defendants' actions violated Article I, Section 7 of the Connecticut Constitution.

VIII. FOURTH CAUSE OF ACTION (Intentional Infliction of Emotional Distress Defendant O'Hare)

23. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

24. Defendant O'Hare shot the plaintiffs' dog in the head in the presence of K.H., as she pleaded with the defendant not to shoot her dog. Said animal was already incapacitated when Defendant O'Hare fired the shot into "Seven's" temple. O'Hare knew or should have known that his actions would cause severe emotional distress to K.H.

25. By his actions, Defendant O'Hare intentionally or recklessly inflicted emotional distress on the plaintiff's minor daughter.

IX. FIFTH CAUSE OF ACTION (Trespass Claim Against Defendants O'Hare and Pia)

26. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

27. Defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so.

28. The actions of the defendants constituted a trespass under Connecticut law, resulting in damage to the plaintiff.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

X. SIXTH CAUSE OF ACTION (Conversion Claim Against Defendant O'Hare)

29. The allegations contained in paragraphs 5 through 14 are hereby incorporated by reference as if fully set forth herein.

30. Defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog forever deprived the plaintiff of his property, a beloved family pet, resulting in damages.

XI. SEVENTH CAUSE OF ACTION (Negligence claim against Defendants O'Hare, Pia, and the City of Hartford)

31. The allegations contained in paragraphs 5 through 13 are hereby incorporated by reference as if fully set forth herein.

32. Defendants O'Hare and Pia were negligent and/or reckless in entering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

33. The defendants' negligence was a proximate cause of the plaintiffs' injuries.

XII. EIGHTH CAUSE OF ACTION (Indemnification against the City of Hartford)

34. The allegations contained in paragraphs 1 through 33 are hereby incorporated by reference as if fully set forth herein.

35. On or about April 9, 2007, notice pursuant to statute was sent to the Town Clerk of the City of Hartford, alleging injury to the plaintiff as a result of the actions of defendants O'Hare and Pia as described in this complaint.

36. The defendant, City of Hartford, is legally responsible to indemnify and protect defendants O'Hare and Pia from any financial expense, including attorney's fees, incurred by the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. d.00119

plaintiff for which said defendants O'Hare and Pia are held liable, pursuant to Conn. Gen. Stat §§ 7-101a and 7-465.

XIII. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray that this Court:

1. Assume jurisdiction over this action;
2. Award compensatory and/or nominal damages to the plaintiff;
3. Award punitive damages to the plaintiff;
4. Award costs of this action, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure;
5. Award attorneys' fees to the plaintiff pursuant to 42 U.S.C. §1988 and Connecticut common law;
6. Grant such other relief as law and equity may provide.

A jury trial is hereby demanded.

Dated at Hartford, Connecticut this 28th day of October, 2008.

THE PLAINTIFFS –

**GLEN HARRIS, individually and P.P.A., as
guardian and parent of K.H., a minor child.**

By: 

Jon L. Schoenhorn
Fed. Bar No. CT00119
108 Oak Street
Hartford, CT 06106
Tel. No. (860) 278-3500

F:\SHARED\CLIENTS\Ayers-Harris\Ayers complaint.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

EXHIBIT I

Westlaw.

Not Reported in A.2d

Not Reported in A.2d, 1999 WL 1097174 (Conn.Super.), 25 Conn. L. Rptr. 680

(Cite as: 1999 WL 1097174 (Conn.Super.))

Page 1

C

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.Superior Court of Connecticut.
Francesco BAZZANO,

v.

CITY of HARTFORD, et al.
No. CV 980584611S.

Nov. 18, 1999.

MEMORANDUM OF DECISION

PECK.

*1 On October 29, 1998, the plaintiff, Francesco Bazzano (Bazzano), filed a ten count complaint against the defendants, City of Hartford, Police Chief Joseph Croughwell, Officer Gregory DiPietro, Officer Scott Sansom and Officers John Doe # 1, # 2, and # 3, alleging violations of the state constitution and various state tort laws. The plaintiff alleges that on or about February 2, 1998, he suffered personal injuries and emotional distress when the defendant police officers used unnecessary and unreasonable force in subjecting him to an unlawful stop, detention, arrest, search and seizure.

The plaintiff alleges: violation of article first, §§ 7, 8 and 9 of the Connecticut constitution against defendants DiPietro, Sansom and John Does # 1, # 2 and # 3 (count 1); recklessness and gross negligence against defendants DiPietro, Sansom and John Does # 1, # 2 and # 3 (count 2); assault and battery against defendants DiPietro, Sansom and John Does # 1, # 2 and # 3 (count 3); negligent infliction of emotional distress against defendants DiPietro, Sansom and John Does # 1, # 2 and # 3 (count 4); intentional infliction of emotional distress against defendants DiPietro, Sansom and John Does # 1, # 2 and # 3 (count 5); violation of article first, §§ 7, 8 and 9 of the Connecticut constitution against defendant Croughwell (count 6); violation of article first, §§ 7, 8 and 9 of the Connecticut constitution against defendant City of Hartford (count 7);

liability pursuant to General Statute § 52-557n against defendant City of Hartford (count 8); liability under a theory of respondeat superior against defendant City of Hartford (count 9); and indemnification pursuant to General Statute § 7-465 against defendant City of Hartford (count 10).

On March 1, 1999, the defendants, City of Hartford, Joseph Croughwell, Gregory DiPietro and Scott Sansom (collectively the defendants) filed a motion to strike the portion of count one alleging a violation of article one, § 8 of the Connecticut constitution on the ground that "there is no colorable claim for money damages pursuant to article first, § 8 of the state constitution." At oral argument, the Court granted the motion to strike this claim because the facts alleged fail to state a claim under Article First § 8 of the Connecticut constitution which provides for the rights of an accused in criminal prosecutions. In addition, in the case of Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314, 331, 627 A.2d 909 (1993), the court declined to recognize a cause of action under article first, § 8 of the Connecticut constitution for damages for violations of state due process rights by state or local government officials.

The defendants also move to strike counts six and seven. In counts six and seven, the plaintiff alleges that Chief Croughwell and the City of Hartford violated §§ 7, 8 and 9 of the Connecticut constitution because they improperly or inadequately trained or supervised their police officers in the performance of their duties. Specifically, the plaintiff alleges that the officers were inadequately trained in obtaining probable cause to arrest, effectuating arrests and identifying, apprehending and interacting with mentally impaired persons. Additionally, the plaintiff alleges that Chief Croughwell and the City of Hartford promoted and/or encouraged a policy that permitted the use of unreasonable and excessive force by their police officers.

*2 The defendants move to strike these counts on the ground that "no appellate court in Connecticut has recognized a cause of action for money damages under the state constitution as to a supervisor or municipality

for the alleged unconstitutional conduct of its police officers."The plaintiff alleges in opposition to the defendants' motion to strike that "[t]he Court should recognize a cause of action for money damages under the state constitution as to Chief Joseph Croughwell and the City of Hartford for the unconstitutional conduct of its police officers."

"The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted. In ruling on a motion to strike, the court is limited to the facts alleged in the complaint." (Internal quotation marks omitted.) Waters v. Autuori, 236 Conn. 820, 825, 676 A.2d 357 (1996). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." Novamatrix Medical Systems, Inc. v. BOC Group, Inc., 224 Conn. 210, 215, 618 A.2d 25 (1992).

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the United States Supreme Court concluded that federal courts possess the power to create a private cause of action for money damages directly under the federal constitution. Relying on Bivens, the Connecticut Supreme Court in Binette v. Sabo, 244 Conn. 23, 33, 710 A.2d 688 (1998), recently held that it has the inherent power to recognize new tort causes of action, whether derived from a statutory provision or rooted in the common law. In Binette, the court recognized a private cause of action for money damages for violations of article first, §§ 7 and 9 of the state constitution based on an alleged unreasonable search and seizure and unlawful arrest by defendant municipal police officers. See Binette v. Sabo, *supra*, 244 Conn. 49-50. As discussed *supra*, no appellate court in Connecticut has recognized a cause of action under article first, § 8 of the state constitution. See Kelley Property Development, Inc. v. Lebanon, *supra*, 226 Conn. 331.

In recognizing this new cause of action [under Article First, §§ 7 and 9], the court "emphasize[d] that our decision to recognize a Bivens-type remedy in this case does not mean that a constitutional cause of action exists for every violation of our state constitution." Binette v. Sabo, *supra*, 244 Conn. 47. Accordingly, the Binette court held that "[w]hether to rec-

ognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis ... [T]hat determination will be based on a multifactor analysis. The factors to be considered include: the nature of the constitutional provisions at issue; the nature of the purported unconstitutional conduct; the nature of the harm; separation of powers considerations and the other factors articulated in Bivens [*supra*, 403 U.S. 396] and its progeny; the concerns expressed in Kelley Property Development, Inc. [*supra*, 226 Conn. 314]; and any other pertinent factors brought to light by future litigation." Binette v. Sabo, *supra*, 244 Conn. 48.

*3 Utilizing this multifactorial analysis in the present case establishes that there are "special factors counselling hesitation" in the creation of a damages remedy. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *supra*, 403 U.S. 396. It is important to note that the petitioner in Bivens sued the agents of the Federal Bureau of Narcotics who allegedly violated his rights, not the Bureau itself. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, *supra*, 389-90. In Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994), the Supreme Court explained that it "implied a cause of action against federal officials in Bivens, in part, because a direct action against the Government was not available ... [T]he purpose of Bivens is to deter the officer ... if we were to imply a damages action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers ... [T]he deterrent effects of the Bivens remedy would be lost." (Emphasis in original.) Federal Deposit Ins. Corp. v. Meyer, *supra*, 485.

Likewise, the deterrent effects of the Bivens remedy would be lost if the court was to imply a damages cause of action directly against the municipality and a supervisor in the present case. Additionally, the plaintiff has stated a claim for relief under provisions of the Connecticut constitution and state tort law that affords him adequate redress. Moreover, the United States Supreme Court has recently "responded cautiously to suggestions that Bivens remedies be extended into new contexts." (Citations omitted; internal quotation marks omitted.) Federal Deposit Ins. Corp.

Not Reported in A.2d

Page 3

Not Reported in A.2d, 1999 WL 1097174 (Conn.Super.), 25 Conn. L. Rptr. 680

(Cite as: 1999 WL 1097174 (Conn.Super.))

v. Meyer, supra, 510 U.S. 484.

Accordingly, the motion to strike is granted in its entirety.

Conn.Super.,1999.

Bazzano v. City of Hartford

Not Reported in A.2d, 1999 WL 1097174

(Conn.Super.), 25 Conn. L. Rptr. 680

END OF DOCUMENT

EXHIBIT J

Westlaw

Not Reported in A.2d

Page 1

Not Reported in A.2d, 1998 WL 321858 (Conn.Super.), 22 Conn. L. Rptr. 236

(Cite as: 1998 WL 321858 (Conn.Super.))

C

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut.
 Stephenie BOUDREAU ppa Tracy Boudreau et al.
 v.
 CITY of Middletown et al.
 No. CV 970083396S.

June 9, 1998.

MEMORANDUM OF DECISION

HODGSON.

*1 The motion to strike now before this court in the above-captioned case raises the issue of the liability of police officers for removing a child from a parent on the apparent belief that an application for temporary custody constituted a court order. The defendant officers have moved to strike the second count of the complaint, in which the plaintiffs allege negligent interference with the custodial rights of Tracy Boudreau, the mother of the minor child, Stephanie Boudreau, by defendant Middletown police officers Frank Schriener and Richard Spencer. The officers have also moved to strike the fourth count, in which both plaintiffs allege deprivation of the minor plaintiff's state constitutional rights to security in her person and in her house as well as her right to liberty and equal protection of the laws. Tracy Boudreau asserts as a constitutional claim a right to equal protection of the law.

The defendant City of Middletown has moved to strike the fifth count, in which the plaintiffs allege a cause of action for indemnification of the officers pursuant to Conn. Gen.Stat. § 7-465. The City has also moved to strike the sixth count, in which the plaintiffs allege that the City negligently trained or supervised the defendant officers in the recognition of court orders of child custody.

Standard of review

The function of a motion to strike is to test the legal sufficiency of the allegations of a complaint to state a claim upon which relief may be granted. Novamatrix Medical Systems, Inc. v. BOC Group, Inc., 224 Conn. 210, 214-15, 618 A.2d 25 (1992); Practice Book § 10-39; Ferryman v. Groton, 212 Conn. 138, 142, 561 A.2d 432 (1989). In adjudicating a motion to strike, the court must construe the facts in the complaint most favorably to the plaintiff. Bohan v. Last, 236 Conn. 670, 675, 674 A.2d 839 (1996); Sassone v. Lepore, 226 Conn. 773, 780, 629 A.2d 357 (1993); Novamatrix Medical Systems, Inc. v. BOC Group, Inc., 224 Conn. at 215, 618 A.2d 25; Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 170, 544 A.2d 1185 (1988).

Negligent Interference with Custodial Rights

The defendants have moved to strike the second count of the complaint on the ground that Connecticut does not recognize a cause of action for negligent interference with a party's custodial rights, and that liability is limited to situations in which a person intentionally interferes with legal custody.

In the second count of the complaint, Tracy Boudreau alleges that Stephen Neary, the father of her daughter, Stephanie Boudreau, went to the Middletown police department and alleged that he had been given temporary custody of the minor child. The plaintiff alleges that Neary gave the defendant police officers a document titled Application for Relief From Abuse. She alleges that on the basis of that document and Neary's representations the officers went to the plaintiffs' residence and removed the minor child forcibly, over the plaintiffs' objections. The plaintiff alleges that the document supplied to the police by Neary was only an application for temporary custody, not an order awarding it to him, and that the officers were negligent in failing to recognize that the document was not a court order. The plaintiffs have not alleged that Neary lacked custodial rights as the father of the child, that the police officers knew that Neary had no custodial rights, or that they removed the child knowing that it

Not Reported in A.2d

Page 2

Not Reported in A.2d, 1998 WL 321858 (Conn.Super.), 22 Conn. L. Rptr. 236

(Cite as: 1998 WL 321858 (Conn.Super.))

was unlawful to do so.

*2 The Connecticut Supreme Court recognized a civil cause of action for the tort of abduction of a child in Marshak v. Marshak, 226 Conn. 652, 628 A.2d 964 (1993). In Marshak, a woman whose husband removed their children to Israel sued her mother-in-law and others for conspiring with the husband to flee with the children. The Supreme Court found that because both parents had custodial rights at the time the defendants aided the father, the conduct alleged was not within the scope of the tort that the Supreme Court was recognizing. The Supreme Court ruled that "(i)n order to impose liability on a third party for conspiring with or aiding another in the removal of children from a custodial parent, the third party must have conspired with, or aided the other, 'to do a criminal or an unlawful act or a lawful act by criminal or unlawful means.'" 226 Conn. at 651-52.

In Zamstein v. Marvasti, 240 Conn. 549, 565, 692 A.2d 781 (1997), the Supreme Court indicated that a claim of wrongful interference with custodial rights is properly stricken if a plaintiff fails to allege unlawful custody.

The plaintiffs have alleged that Neary was Stephanie's father. They have not alleged that he was without custodial rights. The plaintiffs urge this court to read the allegation that Tracy Boudreau had custody as implying that Neary had no custodial rights. Such a construction would go far beyond the required favorable construction of allegations upon a motion to strike. In Marshak v. Marshak, there were no pending dissolution proceedings, and the Court noted that both parents had custodial rights. In the absence of an allegation that Neary had no rights, this court has no basis for interpreting the pleadings as so alleging, especially since the existence or nonexistence of such rights was held in Marshak to be a dispositive issue with regard to the liability of the third parties who had been sued for aiding the father.

The cause of action recognized in Marshak was stated to be derived from the provision in the criminal statutes, Conn.Gen.Stat. § 53a-98, making it illegal to interfere with the custody of a child with knowledge of the absence of legal right to do so. The Supreme Court did not recognize a cause of action against aiders or

abettors with no knowledge that the person aided was without rights to custody. If knowledge of lack of entitlement to custody were not an element of the tort, sellers of airline tickets and renters of cars to child abductors would potentially be subject to civil liability for aiding the abduction, and people would be unable to travel with children without continually presenting evidence of legal custody.

By alleging only negligence and neither an absence of custodial rights nor knowledge that Neary was without custodial rights, the plaintiff has failed to state a cognizable cause of action for interference with custodial rights.

Constitutional Claims

*3 In the fourth count of the complaint, the plaintiffs allege the defendant officers' conduct constituted a constitutional tort that gives rise to a direct cause of action under Article First, Sections 1, 7, 8, 9, and 20 of the Connecticut Constitution. In Binette v. Sabo, 244 Conn. 23 (1998), the Connecticut Supreme Court recognized that a claim could be brought directly under the Constitution against government agents who violated citizens' rights to be free of unreasonable searches and seizures.

The minor child alleges that she was seized and removed from her home forcibly and without probable cause by police officers acting in the course of their employment in violation of Article First, §§ 7 and 9 of the Connecticut Constitution. Since the Supreme Court has recognized that a claim may be brought directly under these constitutional provisions, the motion to strike must fail as to the portions of the fourth count that rely on Article 1, sections 7 and 9.

The plaintiffs have further alleged causes of action under the equal protection and due process clauses of the State Constitution, Article First, Sections 1 and 20. The Connecticut Supreme Court has not recognized direct causes of action under these provisions, and this court must consider whether the same reasoning that led the majority in Binette v. Sabo to recognize direct claims under Article First Secs. 7 and 9 applies equally to the assertion of direct claims under these other provisions.

Not Reported in A.2d

Page 3

Not Reported in A.2d, 1998 WL 321858 (Conn.Super.), 22 Conn. L. Rptr. 236

(Cite as: 1998 WL 321858 (Conn.Super.))

In *Binette v. Sabo*, 244 Conn. at 33, 35, 46, the Connecticut Supreme Court stated repeatedly that it was recognizing a direct cause of action under State Constitution Sections Article First, Secs. 7 and 9⁴ "for the policy reasons articulated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*," 403 U.S. 388, 915, Ct.1999, 29 L.Ed.2d 619 (1971). The Connecticut Supreme Court also stated that "we emphasize that our decision to recognize a *Bivens*-type remedy in this case does not mean that a constitutional cause of action exists for every violation of our state constitution." *Binette v. Sabo*, 244 Conn. at 47, and that each claim for recognition of a direct cause of action under a constitutional provision must be determined on a case-to-case basis, on analysis that includes the following factors: the nature of the constitutional provision at issue, the nature of the purported unconstitutional conduct, the nature of the harm, separation of powers consideration and "the other factors articulated in *Bivens* and its progeny" as well as "the concerns expressed in *Kelley Property Development, Inc. v. Lebanon*, 226 Conn. 314, 627 A.2d 909 (1993) and any other pertinent factors brought to light by future litigation." 244 Conn. at 23.

The due process and equal protection claims of the plaintiffs appear to be the same claims as the claims of unreasonable seizure. The minor child's complaint is that she was denied of her liberty, that is, seized, without due process of law. She has made no effort in her brief to distinguish this claim from the claims made under Article First, Secs. 7 and 9. Both plaintiffs assert that they were deprived of their right to equal protection of the law. They have not explained any way in which they suffered a deprivation distinct from the claimed seizure. Since no distinct and separate claims have been articulated under sections 1, 8 and 20, it appears that the assertion of claims under sections 7 and 9 for the claimed illegal seizure and detention are sufficient to protect the plaintiffs from the prospect of being without redress for the conduct at issue.

*4 The motion to strike is granted as to the claims set forth in the fourth count at paragraph 19(c), (d), and (e) only.

Indemnification

In the fifth count of the complaint, the plaintiffs claim a right to indemnification pursuant to Conn.Gen.Stat. § 7-465. To recover under the statute, the statute itself requires that a plaintiff must plead and prove that she has served the municipality with written notice of the action and the injury within six months of the accrual of the cause of action. The plaintiffs have attached to their complaint a notice of claim dated March 25, 1996. The alleged negligent conduct of the defendant officers is alleged in the complaint to have occurred on September 11, 1995, more than six months before the date of the notice.

The plaintiffs assert that their cause of action did not accrue until November 20, 1995, when they received a copy of the police report concerning the incident of September 11, 1995.

A cause of action "accrues" when the essential elements of a claim of negligence are known to the plaintiff: breach of a duty and resulting harm caused by that breach. *Catz v. Rubenstein*, 201 Conn. 39-44, 513 A.2d 98 (1986); *Barnes v. Schlein*, 192 Conn. 732, 473 A.2d 1221 (1984).

The plaintiffs have alleged that the officers' alleged wrongful seizure of Stephanie Boudreau occurred on September 11, 1995. The complaint does not indicate when the plaintiffs determined that this conduct was wrongful, that is, when the plaintiffs determined that no court order or lawful authority mandated the officers' actions. While the defendants have stated in their brief that the child was returned to her mother the next day, a circumstance that would imply discovery on September 12 that the removal was not pursuant to a legal order, allegations in briefs cannot be the basis of adjudication of a motion to strike.

This court is unable to determine on the basis of the pleadings that there is no set of facts by which the plaintiffs' cause of action can be found to have accrued within six months of the giving of the statutory notice. If, for example, the plaintiffs were delayed by the defendant from learning the status of the court order and application for custody, the notice could conceivably be timely. Accordingly, pursuant to the standards of review applicable to motions to strike, which are set forth above, the determination of the

Not Reported in A.2d

Page 4

Not Reported in A.2d, 1998 WL 321858 (Conn.Super.), 22 Conn. L. Rptr. 236
(Cite as: 1998 WL 321858 (Conn.Super.))

plaintiffs compliance with the notice requirement
must await factual development,

Governmental Immunity

The plaintiffs have agreed in their brief in opposition
to the motion to strike that they will delete the sixth
count and the claim for attorneys fees.

Conclusion

The motion to strike is granted as to second count and
as to the claims set forth at paragraphs 19(c), (d) and
(e) of the fourth count. The plaintiff has agreed to
delete the sixth count. The motion to strike is denied as
to the fifth count and as to the claims set forth in the
fourth count at paragraphs 19(a) and (b) as to both
plaintiffs.

Conn.Super.,1998.

Boudreau v. City of Middletown

Not Reported in A.2d, 1998 WL 321858
(Conn.Super.), 22 Conn. L. Rptr. 236

END OF DOCUMENT

EXHIBIT K

Westlaw

Not Reported in A.2d

Not Reported in A.2d, 2002 WL 31875443 (Conn.Super.)

(Cite as: 2002 WL 31875443 (Conn.Super.))

Page 1

HOnly the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut.
John ASELTON, Administrator,
v.
TOWN OF EAST HARTFORD et al.
No. X07CV010079187S.

Dec. 3, 2002.

Spinella A. Paul & Associates Law Office, Hartford
and Eisenberg, Anderson, Michalik & Lynch, New
Britain, for John Aselton.

Howd & Ludorf, Hartford, for Town of East Hartford,
James Shay, Patricia Learned, Deborah Rataic, Wil-
liam Madore and John Doe.

Alex Sostre, Somers, pro se.

SFERRAZZA, J.

*1 The town of East Hartford moves for summary judgment with respect to those counts of the complaint filed by the plaintiff, John Aselton, administrator of the estate of Brian Aselton, which pertain to it. There are several other defendants including municipal employees. The court heard argument on this motion on November 12, 2002.

Summary judgment shall enter if the pleadings and documentary proof submitted demonstrates that no genuine dispute exists as to material fact and that the movant is entitled to judgment as a matter of law. Practice Book § 17-49.

For purposes of this motion, it is undisputed that on January 23, 1999, Brian Aselton was a police officer employed by the municipality; that at about 9:20 p.m. on that date he was dispatched to the scene of a burglary in progress; that his arrival and presence dis-

rupted the burglary; and that one of the burglars, Alex Sostre, shot and killed Officer Aselton while he was performing his duties as a police officer.

I

In the first, third, and fifth counts of the complaint, the plaintiff asserts that the town negligently "hired, screened and retained" police dispatchers Patricia Learned, Deborah Rataic, and William Madore and that this negligence proximately caused Officer Aselton's death. These claims are barred by the exclusivity of our workers' compensation law. C.G.S. § 31-284(a) states that an employer "shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained ..."

The exclusivity provision is a "central feature" of Connecticut's statutory scheme of workers' compensation. Melanson v. West Hartford, 61 Conn.App. 683, 684 (2001), cert. denied, 256 Conn. 904 (2001). Our legislature has specifically designed our law to make it difficult for employees to avoid this prohibition against law suits seeking compensation for workplace injuries. Id., at 687.

The exclusivity afforded by § 31-284(a) "manifests a legislative policy decision that a limitation on remedies under tort law is an appropriate trade-off for the benefits provided by workers' compensation." Driscoll v. General Nutrition Corp., 252 Conn. 215, 221 (2000). This trade-off reflects a compromise of the right to common-law remedies for workplace injury in exchange for "relatively quick and certain compensation." Id. Any ambiguities in the Act must be resolved to advance this remedial purpose. Id.

Consequently, summary judgment must be granted as to the first, third, and fifth count.

II

The seventh count of the complaint alleges that the

Not Reported in A.2d

Page 2

Not Reported in A.2d, 2002 WL 31875443 (Conn.Super.)
(Cite as: 2002 WL 31875443 (Conn.Super.))

municipality is liable for "willful, serious and/or intentional misconduct" because its untrained and unsupervised dispatchers sent Officer Aselton to the active burglary site without proper inquiry and instruction, which conduct resulted in his death. This allegation is an attempt to bring this case within the exception to the exclusivity of workers' compensation as recognized in Suarez v. Dickmont Plastics Corp., I and II, 229 Conn. 99 (1994), and 242 Conn. 255 (1997), respectively.

*2 Before the decision in Jett v. Dunlop, 179 Conn. 215 (1979), our Supreme Court had consistently ruled that workers' compensation is the sole remedy available to employees for work-related injury. Id., at 217. In that case, the Supreme Court recognized, in dictum, a possible exception to the exclusivity of workers' compensation where the employer intentionally directs or authorizes another employee to assault the injured party. Id., at 218. An "employer" in this context means not merely an agent or one in a supervisory role but one "of such rank" so as to "be deemed the alter ego" of the employer. Id., at 219.

In Mingachos v. CBS, Inc., 196 Conn. 91 (1985), our Supreme Court was asked to extend the exception mentioned in Jett v. Dunlop, *supra*, to the situation where the employer intentionally violates safety rules and regulations regarding safe ventilation, fails to correct such violations, and fails to warn employees of the dangers created, which conduct results in an explosion which kills an employee. The Supreme Court declined this invitation to expand the crack in the exclusivity shield. Id., at 100. Instead, the Court held that "intentionally," for purposes of avoiding the exclusive remedy of workers' compensation, means to intend the consequent harm and not just the action which precipitated that harm. Id., at 101. This intent is distinguishable from reckless behavior. Id., at 102-03. High foreseeability or strong probability are insufficient to establish this intent. Id. Although such intent may be proven circumstantially, what must be established is that the employer *knew* that the injury was substantially certain to follow the employer's deliberate course of action. Id. To hold otherwise would undermine the statutory scheme and purpose of the workers' compensation law and usurp legislative prerogative. Id., at 103-06.

Definitive explication of the intentional injury exception to workers' compensation exclusivity came in Suarez v. Dickmont Plastics Corp., I, 229 Conn. 99 (1994). There, our Supreme Court explained that the substantial certainty test differed from a pure intent test in that the employee need only show that the employer believed there was a substantial certainty that the employee would suffer injury from its deliberate conduct rather than a requirement that the employer intended the injury to occur. Id., at 109-11.

It is not the gravity of the employer's conduct which comes under scrutiny but rather the employer's subjective belief. Suarez v. Dickmont Plastics Corp., II, *supra*, at 279. The "mere failure to provide appropriate safety or protective measure" cannot alone imply this belief. Suarez v. Dickmont Plastics Corp., I, *supra*, at 111. The substantial certainty standard necessitates a showing that the activity producing the injury to the employee "was intentional or deliberate and the resulting injury, from the standpoint of the employer was substantially certain to result from the employer's acts or conduct." Ramos v. Branford, 63 Conn.App. 671, 680 (2001).

*3 "Failure to take affirmative remedial action, even if wrongful, does not demonstrate an affirmative intent to create a situation that causes personal injury." Melanson v. West Hartford, *supra*, at 689. Such delinquencies as the failure to train or supervise dispatchers properly is not circumstantial evidence of a subjective *belief* by his employer that Officer Aselton was substantially certain to be shot when sent to investigate a complaint. Id.

This count fails on at least three grounds. First, this allegation merely avers that the town allowed untrained and unsupervised dispatchers to perform police dispatch duty. Absent is any allegation or evidence that any highly placed town official actually harbored the belief that the lack of such training and oversight would proximately result in Sostre's murder of Officer Aselton. Again, it is not the gravity of the employer's conduct or the employee's injury which is the focus under Suarez, I and II, but rather the subjective belief of the employer that the particular injury claimed was substantially certain to occur.

Secondly, the plaintiff's claim in this count also fails

Not Reported in A.2d

Not Reported in A.2d, 2002 WL 31875443 (Conn.Super.)

(Cite as: 2002 WL 31875443 (Conn.Super.))

Page 3

because there is no allegation nor any proof satisfying the alter ego liability test articulated in *Jett v. Dunlop*, *supra*, at 219. In that case our Supreme Court held that, under workers' compensation law, an employer is not liable for common-law torts based on the intentional misconduct of an employee, even one occupying a supervisory role, such as a foreman. See *Melanson v. West Hartford*, *supra*, at 690. In order for an employer to incur liability, the wrongdoer who causes intentional injury must be of such high rank as to be an alter ego of the employer.

It is doubtful that a municipal corporation can ever have such an employee. But even if that proposition is legally possible, the pleadings lack the requisite specific allegations. Certainly, the dispatchers and their supervisors fail to have the alter ego status set forth in *Jett v. Dunlop*, *supra*.

The third, and perhaps most significant, basis militating against *Suarez*, I and II, liability results from the operation of C.G.S. § 52-557n.

Municipalities enjoy governmental immunity from suit for tortious injuries unless statutory law removes that protection. *Williams v. New Haven*, 243 Conn. 763, 766 (1998). Section 52-557n is a statute which codifies and limits the common-law regarding governmental immunity and municipal liability. *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 192 (1991). Subsection (a) of § 52-557n delineates the general principles of municipal liability, and § 52-557n(a)(2) expressly retains governmental immunity as to towns for damages arising from the malicious or willful misconduct of municipal officers, employees, or agents.

A municipal corporation cannot act except through the conduct of its officers, employees, and agents. A priori, any willful or malicious action by a municipality can exist only in the malicious or willful acts of an officer, employee, or agent. But because § 52-557n(a)(2) explicitly exempts municipalities from such liability, and because the holdings in *Suarez*, I and II, *supra*, require actual intent or actual belief that Officer Aselton was substantially certain to be shot by Sostre, which belief and action would necessarily constitute malice or willful misconduct, the town cannot incur liability under a *Suarez* theory. Indeed, it

is logically impossible for a municipality to incur liability, except through indemnification, perhaps, under *Suarez* I and II because of § 52-557n(a)(2).

IV

*4 The eighth count of the plaintiff's complaint purports to state a claim pursuant to 42 U.S.C. § 1983 against the town of East Hartford. Section 1983 provides an individual with a cause of action where a person, acting under color of law, causes another to be deprived of rights secured by the federal Constitution or laws of the United States.

A municipality may not be sued under § 1983 for an injury afflicted solely by its employees or agents. It is well settled that a municipality may not be held liable under § 1983 solely on a respondeat superior basis. It may be held liable when the complained of actions are the result of the government's policy or custom. *Monnell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Davis v. Zirkelback*, 149 F.3d 614 (7th Cir.1998); *Auriemma v. Rice*, 957 F.2d 397 (1992); *Baxter v. Vigo County School Corp.*, 26 F.3d 728 (1994); *Amati v. Woodstock*, 829 F.Supp. 998 (N.D.Ill.1993); *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976 (2000). The plaintiff alleges that inadequate training, guidelines, supervision and disciplinary measures existed within the East Hartford Police Department so as to constitute a policy of that Department, and that said policy caused the death of Officer Aselton. Only where a failure to train reflects a deliberate or conscious choice by the municipality can the failure be properly thought of as an actionable city policy. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

The plaintiff here must demonstrate either that the actions of the various individual defendants resulted from the official written policy of the government regarding dispatching procedures or that such actions were widely accepted and constituted the known custom of the city. It is axiomatic that the lack of a policy cannot constitute a policy. The plaintiff also fails to submit any evidence that the shortfalls complained of were customary. The only documentation submitted by the plaintiff in opposition to the motion for summary judgment is a report by his purported expert stating that there are deficiencies within the

Not Reported in A.2d

Page 4

Not Reported in A.2d, 2002 WL 31875443 (Conn.Super.)

(Cite as: 2002 WL 31875443 (Conn.Super.))

East Hartford dispatch department and that said deficiencies have been existent for at least nine years. This fails to establish a governmental policy or custom.

Even if the plaintiff had proven the existence of a municipal policy, the plaintiff must also prove that the actions of the municipality amounted to constitutional violations. The plaintiff claims that his rights were violated under the Fourth and Fourteenth Amendments to the U.S. Constitution.^{FN1}

FN1. In his complaint, the plaintiff also alleged First and Sixth Amendment violations. These claims have been withdrawn.

The Fourth Amendment to the U.S. Constitution "prohibits unreasonable seizures; it is not a general prohibition of all conduct that may be deemed unreasonable, unjustified or outrageous. see *Carter v. Buscher*, 973 F.3d 1328, 1332 (7th Cir.1992)." *Medeiros v. O'Connell*, 150 F.3d 164, 167 (2d Cir.1998). The plaintiff claims that Officer Aselton's rights were violated when the defendant intentionally placed him into a zone of foreseeable danger. The U.S. Supreme Court has stated "that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989). Assigning an employee to work in a certain place is not a seizure contemplated by the Fourth Amendment. Accordingly, Officer Aselton's Fourth Amendment rights were not implicated in this case.

*5 The due process clause of the Fourteenth Amendment is a limitation on the state's power to act. It forbids the state to deprive individuals of life, liberty, or property without due process of law. The due process clause, however, is not a guarantee of certain minimum levels of safety and security and it cannot be extended to impose an affirmative obligation on the town to ensure that those interests are not harmed through other means. "As a general matter, the [Su-

preme] Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decision-making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). The conduct alleged must be arbitrary or conscience-shocking to constitute an abuse of due process. *Id.*

The plaintiff's Fourteenth Amendment claim is based upon the assertion that the defendant made Officer Aselton's work environment more dangerous by creating an increased risk of harm. In *Walker v. Rowe*, 791 F.2d 507 (7th Cir.1986), the estates of three deceased prison guards brought claims against the Department of Corrections and an assistant warden after they were killed by inmates. The allegations included inadequate training, defective phone systems and cells, failure to control the inmates who had formed groups and taken charge of the prison, many of whom were known to make weapons in the metal shop. The Seventh Circuit Court of Appeals stated that even assuming that these acts and omissions increased the risk of injury facing the guards, there were no constitutional violations giving rise to § 1983 liability. The Court stated "The defendants did not kill or injure the guards; prisoners did, and this makes all the difference. To see why, consider the language of the due process clause of the Fourteenth Amendment, on which the guards rely: 'Nor shall any State deprive any person of life, liberty or property, without due process of law ...' The constitution requires the state to grant 'process' before it deprives people of life, liberty or property. It is a constraint on the state's power to act, a prohibition on the misuse of official power. It does not require the state to guarantee life, liberty or property against invasion by private actors; it requires only that the state not act, unless with due process, when life, liberty or property are in the balance." *Id.*, at 509.

The plaintiff has alleged that inadequate training, lack of protocol, supervision and oversight within the East Hartford dispatch department increased the danger to Officer Aselton, thereby violating his Fourteenth Amendment right to due process. Based on the information before the court, the defendant's conduct does not rise to the level of conduct that is arbitrary or shocks the conscience, the standard necessary to maintain a due process claim.

Not Reported in A.2d
 Not Reported in A.2d, 2002 WL 31875443 (Conn.Super.)
 (Cite as: 2002 WL 31875443 (Conn.Super.))

Page 5

V

Turning to the ninth count of the complaint, the plaintiff claims damages against the municipality directly arising from purported violations of §§ 4, 7, 8, 9 and 14 of the Connecticut Constitution. This claim is untenable on at least two grounds.

A.

*6 Common-law causes of action for constitutional violations are cognizable only against individuals and are disallowed against municipalities. An analysis of the evolution of common-law constitutional claims is necessary at this point. The source of judicially created private causes of action seeking damage for constitutional violations is the United States Supreme Court case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In that case the United States Supreme Court permitted a civil damages suit against federal officers for certain violations of the federal constitution for which no other remedy existed. Such common-law actions seeking monetary damages for constitutional infringements have come to be called *Bivens* actions.

In *Kelley Property Development, Inc. v. Lebanon*, 226 Conn. 314 (1993), our Supreme Court rejected adoption of *Bivens* liability in Connecticut where the plaintiff contended that state substantive and procedural due process rights were derogated by the action of local zoning officials. While the Court in that case found no cognizable cause of action, it employed the analysis and criteria set forth in the *Bivens* case in arriving at that conclusion. In using this approach, our Supreme Court implicitly suggested that, in an appropriate matter which satisfied the *Bivens* criteria, such a cause of action might be viable.

Five years later, our Supreme Court found a case where the facts and constitutional violations claimed fulfilled the *Bivens* requirements, and the Court created a common-law cause of action. *Binette v. Sabo*, 244 Conn. 23 (1998). However, our Supreme Court has been constant in stating that in deciding whether a *Bivens* action ought to be permitted for a given state constitutional violation, the *Bivens* case

and its federal progeny would guide Connecticut courts. *Kelley Property Development, Inc. v. Lebanon*, *supra*, at 338; *ATC Partnership v. Windham*, 251 Conn. 597, 613 (1999).

In 1994, the United States Supreme Court held that *Bivens* actions apply only to individuals and not governmental agencies. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). Recently, that Court has reiterated and expanded the restriction holding that *Bivens* actions are available only against individuals and not private corporate entities engaged in governmental business. *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001).

Applying the limitations pertaining to *Bivens* actions as announced by the United States Supreme Court, no *Bivens* action can be maintained directly against the town of East Hartford for any violations of the state constitution.

B.

Even if municipalities were susceptible to *Bivens* actions, this particular case would be barred because of the exclusivity of our workers' compensation law. Courts cannot create causes of action for damages where the legislature has expressly forbidden them. This principle pertains even as to *Bivens* actions which assert constitutional violations. *FDIC v. Meyer*, *supra*, at 475. Put another way, *Bivens* actions can exist only in the absence of a legislative restriction forbidding such suits. Indeed, our Supreme Court in *Binette v. Sabo*, *supra*, acknowledged that the *Bivens* decision itself was premised on the fact that Congress had not provided a remedy "nor had it prohibited an award of damages." *Id.*, at 36.

*7 In the present matter, our legislature has prohibited an employee from suing an employer for work related injuries and "abolished" "all rights and claims" other than those conferred under workers' compensation. See C.G.S. § 31-284(a). A court would trespass on the separation of powers by allowing municipal employees to sue under *Bivens* where our legislature has forbidden suit. *Kelley Property Development, Inc. v. Lebanon*, *supra*, at 339. Permitting a *Bivens* action against the town because of a work related death would undermine the fundamental purposes of the

Not Reported in A.2d
Not Reported in A.2d, 2002 WL 31875443 (Conn.Super.)
(Cite as: 2002 WL 31875443 (Conn.Super.))

Page 6

workers' compensation system which is to provide the exclusive remedy for such deaths. *Melanson v. West Hartford, supra*, at 684.

VI

The twenty-sixth count is a catch-all claim of liability under respondeat superior incorporating all of the counts against the municipal employee defendants. Based on the exclusivity of the workers' compensation law as explained above, the town can incur no liability under the theory of respondeat superior.

For these reasons, the summary judgment is granted as to the town of East Hartford on all counts pertaining to it.

Conn.Super.,2002.
Aselton v. Town of East Hartford
Not Reported in A.2d, 2002 WL 31875443
(Conn.Super.)

END OF DOCUMENT

EXHIBIT L

Westlaw

Not Reported in A.2d
 Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
 (Cite as: 2003 WL 22333200 (Conn.Super.))

Page 1

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Superior Court of Connecticut,
 Judicial District of New Haven.

Dorinda McKIERNAN,

v.

Carl J. AMENTO.
 No. CV010453718S.

Oct. 2, 2003.

Diane Polan, Paul Garlinghouse, New Haven, for
 Dorinda McKiernan.

Halloran & Sage, Westport, for Carl J. Amento, Harry
 Gagliardi, Carmen Riccitelli and Town of Hamden.

GILARDI, J.

*1 In 1979, the plaintiff began her employment with the town of Hamden as an account clerk in its finance department. She remained in that department until 1991, when she accepted the newly-created position of account clerk in Hamden's police department. The plaintiff's responsibilities included, among other things, assisting the chief of police in the police department's budget preparations.

In April 2000, however, Hamden's legislative council passed a budget for the ensuing fiscal year that eliminated the plaintiff's position and salary from the police department's budget and transferred the plaintiff's position back to Hamden's finance department, as of July 1, 2000. According to the plaintiff, the legislative council passed this budget on the recommendation of Gagliardi and with the concurrence of Amento, both of whom, the plaintiff alleges, sought to exact revenge for her active and public support of various candidates in Hamden's 1997 and 1999 mayoral races.

Later, on June 7, 2000, Riccitelli, in his capacity as

deputy chief of police, issued a letter of reprimand to the plaintiff in which he criticized her review of the police department's accounts, noting that her inaccurate projections embarrassed the office of the chief of police and forced the department to violate a labor agreement. Riccitelli also censured the plaintiff for her disrespectful attitude toward Donald Gray, a police department captain responsible for reviewing budget matters. Distressed by the letter, the plaintiff contacted Hamden's employee assistance program and was ultimately referred to a psychologist, who advised the plaintiff not to return to work.

On June 20, 2000, while the plaintiff was on sick leave, Riccitelli dispatched two police officers to the plaintiff's home to hand deliver a second letter of reprimand. In this letter, Riccitelli criticized the plaintiff for a second account shortfall based on her inaccurate projections and warned her that any future shortages would result in more serious disciplinary action. According to the plaintiff, Riccitelli issued the two letters of reprimand in retaliation for her opposition to the hiring of Riccitelli's stepdaughter as a temporary worker in Hamden's tax department, because it would have violated the union's contract with the town of Hamden.

Distraught by these events, the plaintiff remained on sick leave until her benefits ran out in December 2000, and, on January 26, 2001, the town of Hamden and Amento terminated the plaintiff's employment because she never returned to work. The plaintiff subsequently filed this ten-count complaint against the defendants, in which she alleges a violation of her right to free speech guaranteed by the United States and Connecticut constitutions, respectively (counts one and two); intentional infliction of emotional distress (counts three, four, and nine); a violation of her right to free speech, equal protection, and due process guaranteed by the United States constitution (counts five and six); defamation (count seven); a violation of her right to due process guaranteed by the United States constitution (count eight); and negligent infliction of emotional distress (count ten).^{FN1}

^{FN1}. The plaintiff withdrew count ten, con-

Not Reported in A.2d

Page 2

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

ceding that the Supreme Court's decision in *Perodeau v. Hartford*, 259 Conn. 729, 792 A.2d 752 (2002), "foreclose[s] plaintiff's negligent infliction of emotional distress claim, since she has not claimed termination or constructive discharge." (Plaintiff's Supplemental Memorandum, p. 14.)

*2 The defendants move for summary judgment as to all ten counts of the plaintiff's complaint on the grounds that: they are entitled to qualified immunity, immunity under *General Statutes § 52-557n(a)(2)(A)*, legislative immunity, and conditional privilege; their conduct was neither extreme nor outrageous; the plaintiff's claims under the Connecticut constitution are not recognized in Connecticut; and the plaintiff fails to state a claim for which relief can be granted under the United States constitution. In support, the defendants filed memoranda of law and the following exhibits: certified deposition transcript of John Ambrogio, a former chief of police; letter of reprimand, dated June 7, 2000; letter of reprimand, dated June 19, 2000; affidavit of James Hliva, Hamden's director of finance; certified deposition transcript of Nolan; certified deposition transcript of Riccitelli; certified deposition transcript of Evelyn Parise, legislative assistant to Hamden's legislative council; certified deposition transcript of Gagliardi; letter of reassignment, dated July 25, 2000. In opposition, the plaintiff filed memoranda of law, the affidavit of the plaintiff and the certified deposition transcript of Amento.

"[S]ummary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Schilberg Integrated Metals Corp. v. Continental Casualty Co.*, 263 Conn. 245, 251-52, 819 A.2d 773 (2003). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law ... and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks

omitted.) *Id.*, at 252. "[A]lthough the party seeking summary judgment has the burden of showing the nonexistence of any material fact ... a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue ... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Internal quotation marks omitted.) *Id.*, at 252-53.

Count One

In count one, the plaintiff alleges that Amento and Gagliardi retaliated against her for engaging in speech protected under the first amendment, in violation of 42 U.S.C. § 1983.^{FN2} The plaintiff claims that Amento and Gagliardi violated her free speech rights when, in retaliation for her support of various candidates in Hamden's 1997 and 1999 mayoral races, Gagliardi, with Amento's concurrence, recommended to the town council that it pass a budget that eliminated the plaintiff's position from the police department. The defendants move for summary judgment as to count one on the ground that the plaintiff's first amendment claim is inadequate as a matter of law, as there was no adverse employment action.

^{FN2}Section 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..."

*3 The Supreme Court has held that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment ... It also recognized that the

Not Reported in A.2d
 Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
 (Cite as: 2003 WL 22333200 (Conn.Super.))

Page 3

state has an interest as an employer in regulating speech by employees so as to promote the efficiency of public services performed by its employees ... Acknowledging the wide variety of fact situations where critical statements by a public employee may be thought to furnish grounds for dismissal, the Supreme Court has declined to lay down a general standard against which all such statements may be judged ... Instead, to assess the extent to which a state may regulate the speech of its employees, courts must balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees ...

Before this balancing test is reached, a plaintiff making a First Amendment retaliation claim under § 1983 must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination ... If a plaintiff establishes these three factors, the defendant has the opportunity to show by a preponderance of the evidence that it would have taken the same adverse employment action even in the absence of the protected conduct.

(Citations omitted; internal quotation marks omitted.)
Morris v. Lindau, 196 F.3d 102, 109-10 (2d Cir.1999).

The defendants challenge the sufficiency of the plaintiff's evidence as to the second element, i.e., the existence of an adverse employment decision. A plaintiff may prove an "adverse employment decision" either by presenting evidence of "the classic examples of discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand"; Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir.2002); or by showing that "(1) using an objective standard; (2) the total circumstances of her working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace ... Incidents that are relatively minor and infrequent will not meet the standard, but otherwise minor incidents that occur often and over a

longer period of time may be actionable if they attain the critical mass of unreasonable inferiority." *Id.*

In this case, the alleged adverse employment decision was the defendants' causing the plaintiff to be transferred from the police department to the finance department. "[A] transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career." Galabya v. New York City Board of Education, 202 F.3d 636, 641 (2d Cir.2000); see also St. Ledger v. Area Co-op Educational Services, 228 F.Supp.2d 66, 74 (D.Conn.2002) ("The defendants' transferring [the plaintiff] to a different position is a 'classic example' of 'adverse employment action,' if it truly was 'adverse' to her"). In St. Ledger, the court addressed whether the defendants' transferring the plaintiff to another position constituted an adverse employment action. Applying the standard set forth in Galabya, the court stated that the plaintiff "has presented no evidence that her new position ... was not materially less prestigious than her prior position ... or a demotion, or less suited to [the plaintiff's] skills and expertise. [The plaintiff's] base salary, benefits, and opportunities for advancement also do not appear to have been affected. As well, it appears that the position was commensurate with her experience and qualifications ... and there was no evidence presented of a material change in the nature of work she performed." St. Ledger v. Area Co-op Educational Services, *supra*, at 74. Thus, the court concluded that the plaintiff did not present sufficient evidence to create a genuine issue of material fact that the alleged actions taken by the defendants constituted an adverse employment action. The court, therefore, granted the defendants' motion for summary judgment as to the plaintiff's first amendment retaliation claim. *Id.*, at 75.

*4 Here, the defendants submit the affidavit of James Hliva, director of Hamden's finance department, in which he states that "[t]he duties and responsibilities of the Account Clerk were essentially unchanged following the transfer to the finance department" and that "[t]he compensation for the position of Account Clerk remained ... unchanged when the position was transferred to the Finance Department ..." (Defendant's Exhibit D.) The plaintiff, however, does not submit any evidence to show that her new position in the finance department was "materially less presti-

Not Reported in A.2d
 Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
 (Cite as: 2003 WL 22333200 (Conn.Super.))

Page 4

gious" than her position in the police department. Consequently, no genuine issue of material fact exists as to whether the plaintiff suffered an adverse employment decision and, therefore, the plaintiff fails to satisfy the second element of a first amendment retaliation claim. Thus, the defendants are entitled to summary judgment as to count one.

Count Two

In count two, the plaintiff realleges the facts in count one and asserts that Amento and Gagliardi violated her right to free speech, as guaranteed by article first, §§ 1, 4, and 8 of the Connecticut constitution. The defendants move for summary judgment as to count two on the ground that the plaintiff's claims under the state constitution are not recognized in Connecticut.

"Not every constitutional right or relationship gives rise to tort liability for its violation. Compare, e.g., *Kelley Property Development, Inc. v. Lebanon*, 226 Conn. 314, 627 A.2d 909 (1993) (no private cause of action based on violation of due process clause of state constitution, article first § 8), with *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 (1998) (private cause of action based on violation of search and seizure provisions of state constitution, article first, §§ 7 and 9)." *Mendillo v. Board of Education*, 246 Conn. 456, 493, 717 A.2d 1177 (1998). "[A]s a general matter, we should not construe our state constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy." *Kelley Property Development, Inc. v. Lebanon*, *supra*, at 339.

Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." In *Smith v. Hartford*, Superior Court, judicial district of Tolland, Docket No. X07 CV 98 070792 (July 14, 2000, Bishop, J.), the court concluded that "[s]ince the legislature has created an adequate statutory remedy in [General Statutes] § 31-51q^{FN3} which affords the protections of Article I § 4, the court does not find that there exists a separate constitutional claim for the violation of free speech." See also *Hankard v. Avon*, Superior Court, judicial district of Hartford, Docket No. CV 960565611 (June 22, 1999, Hale, J.) ("the

court ... decline[s] to recognize a cause of action under the state constitution for the alleged violation of the plaintiffs' right to speak freely since the legislature has provided an adequate remedy by statute"). This court follows these cases and similarly concludes that there is no private cause of action under article first, § 4, of the Connecticut constitution. Accordingly, the court grants the defendants' motion for summary judgment as to the plaintiff's claim brought under article first, § 4, of the Connecticut constitution.

FN3. General Statutes § 31-51q provides in part: "Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge ..."

*5 The plaintiff's claim under article first, §§ 1 and 8, must also fail. Preliminarily, § 1, which prohibits the legislature from passing an act solely for the benefit of an individual without a public purpose, and § 8, which provides in part that "[n]o person shall be deprived of life, liberty or property without due process of law," have no bearing on the alleged deprivation at issue, i.e., the plaintiff's right to free speech. Further, the Connecticut Supreme Court has expressly declined to recognize a private cause of action based on a violation of § 8, the due process clause of the Connecticut constitution; *Kelley Property Development, Inc. v. Lebanon*, *supra*, 226 Conn. at 314; and "no appellate court or trial court in this state has recognized a cause of action for monetary damages under [article first, § 1] of the state constitution." *Schlicht v. Royer*, Superior Court, judicial district of New Britain, Docket No. X03 CV 99 0509270 (December 3, 2002, Aurigemma, J.). "Since our Supreme Court has yet to recognize a cause of action for money damages for a deprivation of fundamental rights under article first, [§§ 1 or 8] of the state constitution, this court is without authority to

Not Reported in A.2d

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

Page 5

do so." *Best v. D'Amario-Rossi*, Superior Court, judicial district of Danbury, Docket No. CV 99 0334718 (January 2, 2003, White, J.). Thus, the court grants the defendants' motion for summary judgment as to the plaintiff's claim brought under article first, §§ 1 and 8, of the Connecticut constitution.

Count Three

In count three, the plaintiff alleges intentional infliction of emotional distress against Amento and the town of Hamden. The defendants move for summary judgment as to count three on the grounds that: (1) the defendants' conduct was not extreme or outrageous, and (2) the town of Hamden is immune from liability under General Statutes § 52-557n(a)(2)(A).^{FN4}

FN4. General Statutes § 52-557n(a) provides in part: "(2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct ..."

In order for the plaintiff to prevail in a case for liability under ... [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe ... Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine ... Only where reasonable minds disagree does it become an issue for the jury ...

Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society ... Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the reci-

tation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous!... Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

*6 (Citations omitted; internal quotation marks omitted.) *Appleton v. Board of Education*, 254 Conn. 205, 210-11, 757 A.2d 1059 (2000).

In *Appleton*, the Supreme Court addressed the plaintiff's claim of intentional infliction of emotional distress in the employment context, particularly whether the defendants' conduct was extreme and outrageous. In her affidavit, the plaintiff, a tenured teacher, claimed that one of the defendants " 'made condescending comments to [her] in front of [her] fellow colleagues questioning [her] vision and ability to read'; telephoned the plaintiff's daughter, representing that the plaintiff 'had been acting differently' and should take a few days off from work; and telephoned the police, who came to the school and escorted the plaintiff out of the building to her car. The plaintiff also asserted in her affidavit that she was subjected to two psychiatric examinations at the request of the board, and that she was forced to take a suspension and a leave of absence and, ultimately, forced to resign." *Id.*, at 211. The court stated that, although "[t]hese occurrences may very well have been distressing and hurtful to the plaintiff ... [t]hey do not ... constitute extreme and outrageous conduct ..." *Id.* Thus, the court held that, "[a]s the defendants' actions were not so atrocious as to exceed all bounds usually tolerated by decent society, their conduct is insufficient to form the basis of an action for intentional infliction of emotional distress." *Id.*, at 212.

Here, in count three, the plaintiff alleges that Amento and the town of Hamden intentionally engaged in extreme and outrageous conduct in failing to notify her that the legislative council eliminated her position in the police department. Specifically, the plaintiff alleges that a friend informed her of the council's action and that she "was shocked and horrified, and suffered severe emotional distress, when she learned in this manner that her position had been eliminated in the budget adopted by the Town of Ham-

Not Reported in A.2d

Page 6

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

den.”(Complaint, Count Three, ¶ 30.) With *Appleton* as guidance, even assuming that the plaintiff has submitted sufficient evidence to support her allegations of the defendants’ conduct, as a matter of law, the defendants’ conduct was not “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ...” (Internal quotation marks omitted.) *Appleton v. Board of Education, supra*, 254 Conn. at 211. The court, therefore, grants the defendants’ motion for summary judgment as to count three.

Count Four

In count four, the plaintiff alleges intentional infliction of emotional distress against Amento and the town of Hamden, claiming that, at the time the council transferred her position, Amento and the town of Hamden knew that she was one year from retirement and that she “could not work in the Finance Department because of a prior problem between the plaintiff and Patricia Riccitelli, a co-worker in that department and the wife of Carmen Riccitelli, which resulted in the plaintiff leaving the Finance Department a decade earlier.”(Complaint, Count Four, ¶ 33.) The defendants move for summary judgment on the same grounds as set forth in count three, i.e., the defendants’ conduct was not extreme or outrageous and the town of Hamden is immune from liability under § 52-557n(a)(2)(A).

*7 In *Dollard v. Board of Education*, 63 Conn.App. 550, 777 A.2d 714 (2001), the Appellate Court considered whether the trial court properly granted the defendants’ motion to strike the plaintiff’s claim of intentional infliction of emotional distress in the employment context. In her complaint, the plaintiff alleged the following: “In 1998 and early 1999, the defendants jointly engaged in a concerted plan and effort to force the plaintiff to resign from her position or to become so distraught that they would have a colorable basis for terminating her employment. The defendants carried out their plan by hypercritically examining every small detail of her professional and personal conduct. Specifically, *the defendants transferred the plaintiff to a school where she did not want to be assigned* and then secretly hired someone to replace her at the school from which she had been transferred. The defendants also publicly admonished

the plaintiff for chewing gum, being habitually late, being disorganized and not using her time well. Finally, *the defendants unnecessarily placed the plaintiff under the intensive supervision of a friend of [one of the defendants]*. The defendants ultimately forced the plaintiff to resign.”(Emphasis added.) *Id.* at 552-53. According to the court, the defendants’ conduct “was no more extreme and outrageous than the conduct alleged in *Appleton*.” *Id.* at 555. The court concluded that the trial court properly granted the defendants’ motion to strike the plaintiff’s claim of intentional infliction of emotional distress.

In the present case, even if the plaintiff has submitted sufficient evidence to support her allegations of the defendants’ conduct, as a matter of law, the defendants’ conduct was no more extreme than that alleged in *Dollard*. As noted in *Perodeau v. Hartford*, 259 Conn. 729, 757, 792 A.2d 752 (2002), albeit in the context of negligent infliction of emotional distress, “individuals reasonably should expect to be subject to ... vicissitudes of employment, such as workplace gossip, rivalry, personality conflicts and the like.” Because the alleged conduct cannot be characterized as extreme or outrageous, and, therefore, fails to satisfy the second element of the test for intentional infliction of emotional distress, the court grants the defendants’ motion for summary judgment as to count four.

Count Five

In count five, the plaintiff alleges that Riccitelli violated her rights to free speech, due process, and equal protection, and brings an action against Riccitelli in his individual capacity under 42 U.S.C. § 1983. Specifically, the plaintiff alleges that, after an altercation with Captain Donald Gray, Riccitelli called the plaintiff into his office, refused her request for union representation, and issued her a letter of reprimand. The plaintiff further alleges that Riccitelli bypassed the chief of police by issuing the letter while the chief was on vacation and violated the procedures for issuing letters of reprimand to unionized employees set for in the union’s contract with the town of Hamden. According to the plaintiff, Riccitelli took these actions in retaliation for her opposition to the hiring of Riccitelli’s stepdaughter as a temporary worker in Hamden’s tax department because it would have violated the

Not Reported in A.2d

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

Page 7

union's contract with the town of Hamden. The defendants move for summary judgment on the ground that the plaintiff fails to state a claim for which relief can be granted under the United States constitution.

First Amendment

*8 "[A] plaintiff making a First Amendment retaliation claim under § 1983 must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination ... If a plaintiff establishes these three factors, the defendant has the opportunity to show by a preponderance of the evidence that it would have taken the same adverse employment action even in the absence of the protected conduct." Morris v. Lindau, *supra*, 196 F.3d at 110.

The defendants challenge the sufficiency of the plaintiff's evidence as to the existence of an adverse employment decision. A plaintiff may prove an "adverse employment decision" by presenting evidence of "the classic examples of discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand..." (Emphasis added.) Phillips v. Bowen, *supra*, 278 F.3d at 109. Here, it is undisputed that Riccitelli issued a letter of reprimand to the plaintiff. Because a letter of reprimand constitutes a classical example of an adverse employment decision; *id.*; the plaintiff has satisfied the second element of a first amendment retaliation claim.

The plaintiff has not, however, presented sufficient evidence to create a genuine issue of material fact as to whether her protected activity was a substantial or motivating factor in the adverse employment action. "The causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action, that is to say, the adverse employment action would not have been taken absent the employee's protected speech ... Causation can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment, or

directly by evidence of retaliatory animus." (Citation omitted.) Morris v. Lindau, *supra*, 196 F.3d at 110. "[A] plaintiff can indirectly establish a causal connection to support a discrimination or retaliation claim by showing that the protected activity was *closely followed in time* by the adverse [employment] action. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir.1996) (citation and quotation marks omitted) (twelve days between alleged sexual harassment and discharge could suggest a causal relationship)." (Emphasis added; internal quotation marks omitted.) Gorman-Bakos v. Cornell Coop of Schenectady County, 252 F.3d 545, 554 (2d Cir.2001).^{FN5}

^{FN5} "This court has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action. Compare Richardson v. New York State Dep't. of Corr. Serv., 180 F.3d 426, 446-47 (2d Cir.1999) (abusive acts within one month of receipt of deposition notices may be retaliation for initiation of lawsuit more than one year earlier); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir.1998) (discharge less than two months after plaintiff filed a sexual harassment complaint with management and ten days after filing complaint with state human rights office provided *prima facie* evidence of a causal connection between protected activity and retaliation); and Grant v. Bethlehem Steel Corp., 622 F.2d 43, 45-46 (2d Cir.1980) (eight-month gap between EEOC complaint and retaliatory action suggested a causal relationship), with Hollander v. American Cyanamid Co., 895 F.2d 80, 85-86 (2d Cir.1990) (passage of three months too long to suggest a causal relationship between complaint and failure to provide good recommendation)." (Emphasis added; internal quotation marks omitted.) Gorman-Bakos v. Cornell Coop of Schenectady County, *supra*, 252 F.3d at 554.

It is undisputed that Riccitelli issued the letter of reprimand to the plaintiff in June 2000. Further, in his deposition testimony, Riccitelli asserted that his

Not Reported in A.2d
 Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
 (Cite as: 2003 WL 22333200 (Conn.Super.))

Page 8

stepdaughter worked for the town of Hamden approximately seventeen or eighteen years ago. (Defendants' Exhibit F, p. 35.) The plaintiff has not, however, presented any evidence from which a trier of fact could conclude that Riccitelli's issuance of the letter of reprimand occurred in temporal proximity to the plaintiff's opposition to the hiring of Riccitelli's stepdaughter as a temporary worker to create a reasonable inference of a causal connection. See Petrario v. Cutler, 187 F.Supp.2d 26, 33 (D.Conn.2002). Accordingly, because the plaintiff has not presented evidence creating a genuine issue of material fact that Riccitelli retaliated against her for her opposition to the hiring of his stepdaughter, the court grants the defendants' motion for summary judgment as to the plaintiff's first amendment claim against Riccitelli.

Due Process

*9 "Due process claims may take either of two forms: procedural due process or substantive due process. Procedural due process claims concern the adequacy of the procedure provided by the governmental body for the protection of liberty or property rights of an individual. Substantive due process claims, on the other hand, concern limits on governmental conduct toward an individual regardless of procedural protections." DeLeon v. Little, 981 F.Supp. 728, 734 (D.Conn.1997).

As to procedural due process, "[a] plaintiff claiming due process protection under the Fourteenth Amendment must possess a property or liberty interest that is somehow jeopardized by governmental action, necessitating a pre- or post-deprivation hearing as a safeguard ... However, [t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions ... An interest protected or cognizable under the due process clause must have a basis in existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Citations omitted; internal quotation marks omitted.) Hunt v. Prior, 236 Conn. 421, 436, 673 A.2d 514 (1996).

"Thus, [p]roperty interests are more than abstract needs, desires or unilateral expectations of benefits or

privileges. Rather, a person must have a legitimate claim of entitlement to a benefit or privilege to have a property interest in that benefit ... Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ..." (Internal quotation marks omitted.) Id., at 436-37.

Although the plaintiff may have had a constitutionally-protected property interest in continued employment, the plaintiff concedes that she was neither terminated nor constructively discharged. (Plaintiff's Supplemental Memorandum, p. 14.) Further, it is undisputed that the plaintiff did not suffer a loss of pay or benefits (Defendants' Exhibit E, p. 97); and that she was not demoted or suspended as a result of the letter (Defendants' Exhibit F, pp. 85-86). The issuance of a letter of reprimand, without more, does not deprive the plaintiff of a constitutionally-protected property interest. See Gillard v. Norris, 857 F.2d 1095, 1097-99 (6th Cir.1988) (reprimand and three-day suspension did not deprive plaintiff of a property interest); Lowe v. Kansas City, Missouri Board of Police Commissioners, 841 F.2d 857, 858 (8th Cir. 1988) (placing letter of reprimand in officer's file did not deprive officer of protected property interest); Sullivan v. Brown, 544 F.2d 279, 283 (6th Cir.1976) (transfer and recorded reprimand did not deprive appellant of a property interest protected by the fourteenth amendment). Thus, the plaintiff has not presented sufficient evidence to create a genuine issue of material fact that the alleged actions taken by Riccitelli deprived her of a constitutionally-protected property interest.

*10 "Similarly ... government acts defaming an individual implicate a liberty interest only where the individual suffers a related alteration of his legal status or deprivation of a right recognized under state law ... Accordingly, damage to reputation alone is insufficient to establish a claim for harm to a liberty interest ... [A] cognizable claim will lie [only] if a plaintiff can show loss of reputation plus some serious additional harm, such as loss of employment, as a result of defamatory remarks by a government official." (Citations omitted; internal quotation marks omitted.) Hunt v. Prior, *supra*, 236 Conn. at 437.

As noted above, it is undisputed that the plaintiff never

Not Reported in A.2d

Page 9

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

suffered a loss of wages or benefits, demotion, suspension, or termination as a result of the letter of reprimand. Moreover, the plaintiff does not present any evidence that the letter of reprimand "so stigmatized [her] as to make it unlikely that [she] will be able to obtain employment in [her] chosen field." *Id.*, at 441. Thus, the court concludes that there is no genuine issue of material fact as to the existence of a constitutionally-protected liberty interest, and, therefore, grants the defendants' motion for summary judgment as to the plaintiff's procedural due process claim.

As to substantive due process, "[t]he Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first test, the plaintiff must prove that the governmental body's conduct 'shocks the conscience.'" *DeLeon v. Little, supra*, 981 F.Supp. at 734. "[W]ith regard to [the] 'shocks the conscience' test that [t]he acts must do more than offend some squeamishness or private sentimentalism ...; they must be such as to offend even hardened sensibilities, or constitute force that is brutal and offensive to human dignity." (Internal quotation marks omitted.) *Id.*, at 734-35. "[M]alicious and sadistic abuses of government power that are intended only to oppress or to cause injury and serve no legitimate government purpose unquestionably shock the conscience." (Internal quotation marks omitted.) *Russo v. Hartford*, 184 F.Supp.2d 169, 196 (D.Conn.2002).

"A salient example of such abuse of power may be found in the very case in which the standard was first enunciated. In *Rochin v. California*, [342 U.S. 165, 172, 72 S.Ct. 205, 96, L.Ed. 183 (1952)], the United States Supreme Court held that the forced pumping of a suspect's stomach to retrieve evidence 'shocked the conscience.' As the court described it, '[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents-this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.'" *ATC Partnership v. Windham*, 251 Conn. 597, 608, 741 A.2d 305 (1999).

*11 Here, even if the plaintiff has presented sufficient

evidence to show that the defendants engaged in the alleged conduct regarding the reprimand, as a matter of law, that conduct does not "shock the conscience." In fact, according to Nolan, Hamden's chief of police, Riccitelli, as deputy chief, "can issue a letter of reprimand to ... employees, civilian or sworn ... within [his] own division." (Defendants' Exhibit E, p. 68.) Further, when asked whether it was improper for Riccitelli to issue a letter of reprimand to the plaintiff without first consulting the chief of police, Nolan stated: "By policy and department rules and [regulations], no. By general operating procedures, where something of this nature should be brought to the attention of the person in charge, which is myself, yes." (Defendants' Exhibit E, p. 86-87.) Nolan also stated that, although he "would prefer that [he] be aware of these letters or anything of this nature" (Defendants' Exhibit E, p. 87); Riccitelli did nothing "illegal or improper or in violation of the department rules or regulations ..." (Defendants' Exhibit E, p. 87). Moreover, as to the plaintiff's allegation that Riccitelli issued the letter of reprimand in retaliation for her opposition to the hiring of Riccitelli's stepdaughter as a temporary worker in Hamden's tax department, the court has already found that the plaintiff has failed to present any evidence from which a trier of fact could conclude that Riccitelli's issuance of the letter of reprimand occurred in temporal proximity to the plaintiff's opposition to the hiring of Riccitelli's stepdaughter as a temporary worker to create a reasonable inference of a causal connection. Thus, although Riccitelli's alleged conduct may have been ill-advised, it cannot be said to "shock the conscience." See *Cattanzaro v. Weiden*, 188 F.3d 56, 64 (2d Cir.1999) (plaintiff "must show that the government action was arbitrary, conscience-shocking, or oppressive in a constitutional sense, and not merely incorrect or ill-advised" [emphasis added; internal quotation marks omitted]).

"Under the second test, the plaintiff must demonstrate a violation of an identified liberty or property interest protected by the Due Process Clause." *DeLeon v. Little, supra*, 981 F.Supp. at 734. The court has already determined that the plaintiff has failed to create a genuine issue of material fact as to the existence of a constitutionally-protected property or liberty interest.

Because no issue of material fact exists as to the ex-

Not Reported in A.2d
 Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
 (Cite as: 2003 WL 22333200 (Conn.Super.))

Page 10

istence of a constitutionally protected property or liberty interest, and because the plaintiff has failed to present any evidence that she was the subject of conduct that "shocks the conscience," the court grants the defendants' motion for summary judgment as to the plaintiff's substantive due process claim.

Equal Protection

In count five, the plaintiff also alleges that Riccitelli violated her federal right of equal protection. Because the plaintiff has not alleged that she is a member of any protected class, the court assumes that her equal protection claim is based on a "class of one."

*12 "The Equal Protection Clause requires that the government treat similarly situated people alike ... 'Although the prototypical equal protection claim involves discrimination against people based on their membership in a vulnerable class, we have long recognized that the equal protection guarantee also extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials.' ...In *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam), the Supreme Court recently affirmed the validity of such 'class of one' claims 'where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' To prevail on a 'class of one' equal-protection claim, plaintiff must 'show, not only 'irrational and wholly arbitrary' acts, but also intentional disparate treatment.' " (Citations omitted.) *Barstow v. Shea*, 196 F.Supp .2d 141, 148 (D.Conn.2002). "Moreover, we are to afford governmental decisions 'a strong presumption of validity.' *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). A governmental decision should be upheld if there is 'any reasonably conceivable state of facts that could provide a rational basis' for the different treatment. *Id.*" *Galligan v. Town of Manchester*, United States District Court, Docket No. 3:01 CV 2092 (D.Conn. May 19, 2003).

In this case, although the plaintiff alleges that "there was no legitimate basis for the Letter of Reprimand in that the plaintiff had not been insubordinate" (Complaint, Count Five, ¶ 41); the plaintiff does not dispute

that she had an altercation with Captain Gray or that her budget projections resulted in account shortfalls. Rather, the plaintiff argues that issues of material fact exist as to "whether [the plaintiff] was actually insubordinate to Captain Gray, [and] whether the budgetary projections she made were intolerably inaccurate ..." (Plaintiff's Supplemental Memorandum, pp. 6-7.) These considerations are irrelevant to the determination of whether Riccitelli had a rational basis for issuing the letter of reprimand. According to Riccitelli, the letter of reprimand is based upon information provided to him by Captain Grey, the police department supervisor responsible for reviewing budget matters. (Defendants' Exhibit F, p. 60.) Thus, even assuming that Riccitelli treated the plaintiff differently, the plaintiff has failed to present evidence that would establish that such treatment was irrational and wholly arbitrary or without legitimate reason. Accordingly, the court grants the defendants' motion for summary judgment as to the plaintiff's equal protection claim.

Count Six

In count six, the plaintiff asserts a claim under 42 U.S.C. § 1983, alleging that Riccitelli violated her rights to free speech, due process, and equal protection, by sending two police officers to her home, while she was on sick leave, to deliver a second letter of reprimand, in which Riccitelli accuses the plaintiff of malfeasance in the performance of her duties and threatens her with suspension. According to the plaintiff, Riccitelli issued the letters of reprimand in retaliation for her opposition to the hiring of Riccitelli's stepdaughter as a temporary worker in Hamden's tax department because it would have violated the union's contract with the town of Hamden. The defendants move for summary judgment on the ground that the plaintiff fails to state a claim for which relief can be granted under the United States Constitution.

First Amendment

*13 In accordance with the discussion in count five, the plaintiff's first amendment retaliation claim must fail. Although the letter of reprimand constitutes an "adverse employment decision"; *Phillips v. Bowen*, *supra*, 278 F.3d at 109; the plaintiff has not presented any evidence from which a trier of fact could conclude

Not Reported in A.2d
 Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
 (Cite as: 2003 WL 22333200 (Conn.Super.))

Page 11

that Riccitelli's issuance of the letter of reprimand occurred in temporal proximity to the plaintiff's opposition to the hiring of Riccitelli's stepdaughter as a temporary worker to create a reasonable inference of a causal connection. See Petrario v. Cutler, supra, 187 F.Supp.2d at 33. Accordingly, because the plaintiff has not presented evidence creating a genuine issue of material fact that Riccitelli retaliated against her for her opposition to the hiring of his stepdaughter, the court grants the defendants' motion for summary judgment as to the plaintiff's first amendment retaliation claim against Riccitelli.

Due Process

The court grants the defendants' motion for summary judgment as to the plaintiff's due process claim for the same reasons articulated in the court's due process discussion in count five.

Equal Protection

The plaintiff also alleges that Riccitelli violated her right of equal protection. The court assumes that her equal protection claim is based on a "class of one." "[T]he Supreme Court recently affirmed the validity of such 'class of one' claims 'where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' To prevail on a 'class of one' equal-protection claim, plaintiff must 'show, not only "irrational and wholly arbitrary" acts, but also intentional disparate treatment.' " Barstow v. Shea, supra, 196 F.Supp. at 148. According to Riccitelli, he issued the second letter of reprimand after Captain Grey informed him that there was a shortfall in crossing guard account. (Defendants' Exhibit F, pp. 71-74.) The plaintiff does not contest that there was a shortfall; rather, she claims that an issue of material fact exists as to whether the "budgetary projections were intolerably inaccurate ..." (Plaintiff's Supplemental Memorandum, p. 7.) Further, according to Hamden's chief of police, it is the police department's practice to have an internal affairs officer hand deliver letters of reprimand to police department employees who are absent from work. (Defendants' Exhibit E, p. 85.) Thus, the plaintiff's equal protection claim must fail as the plaintiff has failed to present evidence that would establish that

such treatment was irrational and wholly arbitrary or without legitimate reason. See Galligan v. Town of Manchester, supra, Docket No. 3:01 CV 2092 ("A governmental decision should be upheld if there is 'any reasonably conceivable state of facts that could provide a rational basis' for the different treatment"). Accordingly, the court grants the defendants' motion for summary judgment as to the plaintiff's equal protection claim.

Count Seven

*14 In count seven, the plaintiff alleges defamation against Riccitelli and the town of Hamden. Specifically, the plaintiff alleges that Riccitelli made false statements in the letters of reprimand he issued to the plaintiff, made the statements with knowledge of their falsity or in reckless disregard for the truth, placed the letters in the plaintiff's personnel file, and did so in his capacity as an employee of the town of Hamden. The defendants move for summary judgment as to the plaintiff's defamation count on the grounds that the statements in the letters of reprimand were true and, even if the statements were defamatory, they were conditionally privileged. The defendants also argue that the town of Hamden is immune from liability under § 52-557n(a)(2)(A). The plaintiff responds that the letters of reprimand are factually inaccurate and that Riccitelli may not avail himself of the conditional privilege because the letters were made in bad faith.

To prevail on a cause of action for defamation, the plaintiff must prove "that the defendants published false statements that harmed the [plaintiff], and that the defendants were not privileged to do so." (Internal quotation marks omitted.) Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc., 234 Conn. 1, 27, 662 A.2d 89 (1995). "In a civil action for libel, where the protected interest is personal reputation, the rule in Connecticut is that the truth of an allegedly libelous statement of fact provides an absolute defense." Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 112, 438 A.2d 1317 (1982).

The plaintiff has presented evidence suggesting that the following statement in the June 7, 2000 letter of reprimand was false: "What disturbs me more is your attitude towards Captain Gray and the fact that you told him to figure out the shortage for the last holiday

Not Reported in A.2d

Page 12

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)
(Cite as: 2003 WL 22333200 (Conn.Super.))

himself."In her affidavit, the plaintiff asserts that "Captain Gray became agitated, screamed at me, banged his fist on a desk, and slammed a stapler on the desk. He then demanded that I 'refigure' the budget amounts to eliminate the shortfall. (Plaintiff's Exhibit A.) According to the plaintiff, "I immediately left Captain Gray's office, returned to my own office, and began shaking and crying."In light of this evidence, the court concludes that there is a genuine issue of material fact regarding the truth of Riccitelli's statement.

The defendants argue, however, that the statement Riccitelli made cannot support a cause of action for defamation because it is a statement of opinion. "[T]he statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion." *Daley v. Aetna Life & Casualty Co.*, 249 Conn. 766, 795, 734 A.2d 112 (1999). "A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known ... In a libel action, such statements of fact usually concern a person's conduct or character ... An opinion, on the other hand, is a personal *comment* about another's conduct, qualifications or character that has some basis in fact." (Citations omitted; emphasis in original.) *Goodrich v. Waterbury Republican-American, Inc.*, *supra*, 188 Conn. at 111. Although "this distinction [between fact and opinion] may be somewhat nebulous ... [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." (Internal quotation marks omitted.) *Id.*, at 111-12.

*15 Riccitelli's statement can be characterized as a statement of fact and, therefore, can support a cause of action for defamation. At a minimum, Riccitelli's statement suggests that it is based on fact, and, therefore, raises a genuine issue of material fact. As noted by the Supreme Court, "[w]here the court cannot reasonably characterize the allegedly libelous words as either fact or opinion because, for example, innuendo is present, this becomes an issue of fact for the jury, which would preclude a directed verdict." *Id.*, at 112 n. 5.

The defendants argue, in the alternative, that Riccitelli's statements were conditionally privileged. "The defendants must sufficiently prove five prerequisites in order to establish the defense of ... conditional [privilege] claimed by them. The essential elements are (1) an interest to be upheld, (2) a statement limited in its scope to this purpose, (3) good faith, (4) a proper occasion, and (5) a publication in a proper manner to proper parties only." *Miles v. Perry*, 11 Conn.App. 584, 595, 529 A.2d 199 (1987). As explained by the Supreme Court, "[t]here are two facets to the defense of privilege. The occasion must be one of privilege, and the privilege must not be abused. Whether the occasion is one of privilege is a question of law ... [W]hether the privilege was abused ... depends upon whether there was malice in fact ... in uttering and broadcasting the alleged defamatory matter." (Internal quotation marks omitted.) *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, *supra*, 234 Conn. at 28.

As to the first facet, "[a] qualified ... privilege arises out of an 'occasion,' such as, when one acts in the bona fide discharge of a public or private duty." *Miles v. Perry*, *supra*, 11 Conn.App. at 594 n. 8. "[C]ommunications between managers regarding the review of an employee's job performance ... are protected by a qualified privilege. Such communications ... are necessary to effectuate the interests of the employer in efficiently managing its business." *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, *supra*, 234 Conn. at 29. Here, the defendants have produced evidence, not refuted by the plaintiff, indicating that the letters of reprimand were issued in circumstances that satisfy the "occasion" facet.

As to the second facet, whether Riccitelli abused the privilege, however, the court finds that summary judgment is inappropriate. A qualified privilege "does not protect a defendant who makes statements that are both defamatory and malicious." *Gaudio v. Griffin Health Services Corp.*, 249 Conn. 523, 545, 733 A.2d 197 (1999). A privilege is abused if the defendant "made the statement about the plaintiff with actual malice—that is, with knowledge of its falsity or reckless disregard as to its truth." *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.*, *supra*, 234 Conn. at 29. Thus, "[e]ven when a legitimate interest is at stake, a claim of conditional privilege is defeated if the de-

Not Reported in A.2d

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

Page 13

defendant acts with malice in making the defamatory communication at issue. For purposes of our law of defamation, malice is not restricted to hatred, spite or ill will against a plaintiff, but includes any improper or unjustifiable motive." Bleich v. Ortiz, 196 Conn. 498, 504, 493 A.2d 236 (1985). The issue of "whether the privilege is ... defeated through its abuse is a question of fact to be decided by the jury." *Id.*, at 501; see also Miles v. Perry, *supra*, 11 Conn.App. at 594 n. 8 ("It is a question of fact for a court or a jury, however, to determine whether the defendant has abused a conditional privilege"). The court, therefore, denies the defendants' motion for summary judgment as to Riccitelli. As to the town of Hamden, however, the court grants the defendants' motion for summary judgment, because § 52-557n(a)(2)(A)^{FN6} specifically exempts the town of Hamden from liability for the wilful, i.e., intentional, deliberate, reckless and malicious, misconduct of its employees.

FN6. General Statutes § 52-557n(a)(2) provides: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct ..."

Count Eight

*16 In count eight, the plaintiff alleges that Amento and the town of Hamden violated her due process rights under the fourteenth amendment. Specifically, the plaintiff alleges that the defendants' claim that the plaintiff's transfer from the police department to the finance department was part of a nondiscriminatory reorganization was a pretext for actual discrimination. The defendants move for summary judgment on the ground that Amento and the town of Hamden did not deprive the plaintiff of a constitutionally-protected interest.

As to procedural due process, the plaintiff's counsel asserted that the plaintiff was deprived of her liberty interest in her first amendment right to free speech. In count one, however, the court granted the defendants' motion for summary judgment as to the plaintiff's first amendment claim, concluding that no genuine issue of

material fact exists as to whether the plaintiff suffered an adverse employment decision. Accordingly, because this court has already granted the defendants' motion for summary judgment as to the plaintiff's first amendment claim in count one (which, as with count eight, is premised on the plaintiff's transfer), the plaintiff cannot prevail on its due process claim by way of her right to free speech. See LaFlamme v. Essex Junction School District, 170 Vt. 475, 482, 750 A.2d 993 (2000) ("with regard to the infringement of his free speech, [the plaintiff] presented that issue to the jury and lost. He cannot prevail on a due process claim by way of a violation of his right to free speech if the jury found that no such violation in fact occurred."). Thus, the court grants the defendants' motion for summary judgment as to the plaintiff's procedural due process claim.

With regard to substantive due process, "[u]nder the first [substantive due process] test, the plaintiff must prove that the governmental body's conduct 'shocks the conscience.'" DeLeon v. Little, *supra*, 981 F.Supp. at 734. Even if the plaintiff has presented sufficient evidence to show that the Amento and the town of Hamden engaged in the alleged conduct, as a matter of law, that conduct does not "shock the conscience." Transferring the plaintiff to a different position, with no loss of pay or status, is "a far cry from the stomach pumping of *Rochin*..." ATC Partnership v. Windham, *supra*, 251 Conn. at 609.

"Under the second test, the plaintiff must demonstrate a violation of an identified liberty or property interest protected by the Due Process Clause." DeLeon v. Little, *supra*, 981 F.Supp. at 734. As stated above, the plaintiff was allegedly deprived of her liberty interest in her first amendment right to free speech. The first amendment, however, provides "an explicit textual source of constitutional protection against [this] particular sort of government behavior"; ATC Partnership v. Windham, *supra*, 251 Conn. at 610; and, therefore, "that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing [this claim]." *Id.*

*17 Because an "explicit textual source of constitutional protection" exists against the type of governmental misconduct alleged by the plaintiff, and because the plaintiff has failed to present any evidence

Not Reported in A.2d

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

(Cite as: 2003 WL 22333200 (Conn.Super.))

Page 14

that she was the subject of conduct that "shocks the conscience," the court grants the defendants' motion for summary judgment as to the plaintiffs' substantive due process claim.

Count Nine

In count nine, the plaintiff alleges intentional infliction of emotional distress against Riccitelli. Specifically, the plaintiff alleges that Riccitelli engaged in extreme and outrageous conduct by issuing two unfounded letters of reprimand and by sending a police officer to her house while she was on sick leave to hand deliver the second letter of reprimand. According to the plaintiff, Riccitelli took these actions in retaliation for her opposition to the hiring of Riccitelli's stepdaughter as a temporary worker in Hamden's tax department. The defendant moves for summary judgment on the ground that Riccitelli's conduct was not extreme or outrageous.

One element of the tort of intentional infliction of emotional distress is that the conduct alleged must be "extreme and outrageous." Appleton v. Board of Education, *supra*, 254 Conn. at 210. In Muniz v. Kravis, 59 Conn.App. 704, 709, 757 A.2d 1207 (2000), "[i]n support of her claim that the defendants' conduct was extreme and outrageous, the plaintiff alleged that the defendants had sent an armed security guard to notify her and her husband of their termination of employment and had given them only twenty-four hours to leave the premises. This happened at a time when the plaintiff was on vacation and when her husband was recovering from a planned surgery. The plaintiff claimed that this caused her great emotional distress and anguish." The court concluded that "[w]hile there are no Connecticut cases with facts exactly similar to those in this case, it is clear that there is liability only for 'conduct exceeding all bounds usually tolerated by decent society ...' " *Id.* As the court concluded that the plaintiff's allegations did not meet this threshold standard, the court held that the trial court properly granted the defendants' motion to strike the plaintiff's claim for intentional infliction of emotional distress. *Id.*, at 711.

In the present case, Riccitelli's conduct is no more extreme and outrageous than that alleged in *Muniz*. As a matter of law, the defendants' conduct was not "so

outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ..." (Internal quotation marks omitted.) Appleton v. Board of Education, *supra*, 254 Conn. at 211. "Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." *Id.* Accordingly, the court grants the defendants' motion for summary judgment as to count nine.

CONCLUSION

*18 Based on the foregoing, the court grants the defendants' motion for summary judgment as to counts one through six, eight, and nine, and denies the defendants' motion for summary judgment as to count seven.

Conn.Super.,2003.

McKiernan v. Amento

Not Reported in A.2d, 2003 WL 22333200 (Conn.Super.)

END OF DOCUMENT

EXHIBIT M

Westlaw

Not Reported in A.2d

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

Page 1

▷

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut.
Katarina V. PETERS, Executrix for the Estate of John
E. Peters,
v.
TOWN OF GREENWICH, et al.
No. CV950147192S.

Jan. 2, 2001.

MEMORANDUM OF DECISION RE: MOTION TO
STRIKE

DANDREA.

*1 The defendants, the Town of Greenwich, First Selectman John Margenot, Jr., Chief of Police Kenneth J. Moughty, Detective Roger M. Wachnicki, and Detective John J. Campbell, Jr., move to strike all eight counts of the plaintiff's ^{FN1} revised complaint. By way of summary, the factual allegations reveal the following. Andrew D. Wilson and the plaintiff's decedent were acquainted through the plaintiff's decedent's son, Dirk Peters. Wilson and Dirk Peters attended high school together. Wilson remained friendly with Dirk Peters and was a frequent visitor to the Peters' home in Greenwich. In 1993, Wilson began to exhibit bizarre behavior manifested by a delusional belief that Dirk Peters, assisted by the plaintiff's decedent Jack Peters, was systematically destroying Wilson's life. Specifically, Wilson believed that Dirk Peters had poisoned him in 1981 with methamphetamine and had hypnotized him in order to obtain control of his thoughts. Wilson believed that Jack Peters, through his workplace, was part of a large organization bent on controlling the minds of others. Wilson further believed that Dirk and Jack Peters were responsible for all the problems in his life including his alcoholism and drug use, the death of Wilson's mother in 1982 of cancer, and the breakup between Wilson and Anne Margenot, a girlfriend of Wilson's back in 1981. Anne Margenot is the daughter of the individual

defendant First Selectman John J. Margenot, Jr.

FN1. The plaintiff is Katrina V. Peters, executrix for the Estate of John E. Peters (a.k.a. "Jack" Peters), her late husband.

The complaint further alleges in detail, including several attached exhibits, that in the months between April and August of 1993, the Greenwich Police Department, specifically Detectives Wachnicki and Campbell received letters and audio tapes directly from Andrew Wilson relaying the above alleged conduct on the part of Dirk Peters and that Wilson believed the Peters were responsible for many of the misfortunes that had occurred in Wilson's life. Between April and July of 1993, First Selectman John Margenot, Jr., also received audio tapes and letters from Andrew Wilson. Additionally, Andrew Wilson's sister, Julia Wilson, repeatedly contacted the Greenwich Police Department, including a July 19, 1993 facsimile addressed to Chief Moughty advising that, in her opinion, her brother, who was then residing in Nantucket, Massachusetts, was mentally ill and was a threat to himself and to Jack and Dirk Peters. She informed them that he had recently had psychiatric treatment and was found to be paranoid and delusional. She also conveyed that Wilson was planning on returning to Connecticut from Nantucket on July 19, 1993, that he had told members of the Wilson family, including his father, that he wanted to get back to Connecticut to "get on with the retribution," and that Andrew Wilson had stated that "the best therapy would be to blow Dirk, Jack, and Todd Peters [Dirk's brother] sky high" and that "Dirk and his father should be taken out to the public courtyard and executed." (Complaint ¶ 25.) Julia Wilson requested that the Greenwich Police Department intervene to avoid a crisis. Julia Wilson also conveyed her information regarding her brother to the Peters. Throughout this same period, Andrew Wilson engaged in a course of conduct marked by harassment and threats towards the Peters by contacting Jack and Dirk Peters. These threats consisted of Wilson screaming on the phone at Jack Peters and sending letters with strange, macabre statements. Wilson also called Anne Margenot, who was living in Georgia, to discuss his bizarre accusa-

Not Reported in A.2d

Page 2

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

tions against the Peters. Consequently, Anne Marge-not changed her telephone number to an unpublished status. Both Dirk and Jack Peters also related this information to the police defendants in late July 1993. As a result, defendant First Selectman John J. Marge-not, Jr., advised Dirk Peters that, in his position as Chief Police Commissioner, he would personally get involved and have the police investigate Wilson's harassment and threats.

Andrew Wilson returned to Connecticut on or about July 19, 1993 and shortly thereafter, applied to buy a gun at a gun shop in New Haven. On August 1, 1993, defendant Detective Campbell met with Dirk Peters and advised him that the Greenwich Police Department was unable to do anything about Wilson and that the Peters family could not get a restraining order against Wilson. Detective Campbell assured Dirk Peters that he and his father were in no danger and that they should not worry. Dirk Peters relayed this to his father on the same day. On or about August 3, 1993, Andrew Wilson took possession of the hand gun. On August 5, 1993, Andrew Wilson shot and killed Jack Peters as he was swimming in his pool in the backyard of the Peters' home in Greenwich.

*2 In counts one and two, the plaintiff alleges that each of the individually named defendants ^{FN2} were negligent and that their negligent acts and/or omissions were a proximate cause of the death of the plaintiff's decedent. In count five, the plaintiff also alleges the defendants Kenneth Moughty and John J. Marge-not, Jr. were negligent for failing to properly supervise, direct and control officers of the Greenwich Police Department. In count seven, the plaintiff alleges that the defendants' actions and/or omissions violated the deceased's right to due process of law under article first, § 8, of the constitution of Connecticut. In counts three, four, six, and eight, the plaintiff incorporates the allegations of negligence asserted against each of the individual defendants, and further claims that the Town of Greenwich is required to indemnify the individual defendants "for their liability to the Plaintiff for damages owing to the Plaintiff" pursuant to General Statutes §§ 7-101a and 7-465. The defendants have filed the current motion to strike all eight counts of the revised complaint.

FN2. The individual defendants named in

counts one and two are: First Selectman John Marge-not, Jr., Chief of Police Kenneth Moughty, Detective John Campbell and Detective Roger Wachnicki.

"The purpose of a motion to strike is to contest ..., the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) Peter-Michael, Inc. v. Sea Shell Associates, 244 Conn. 269, 270, 709 A.2d 558 (1998). In ruling on a motion to strike, the role of the trial court is "to examine the [complaint], construed in favor of the plaintiffs, to determine whether the plaintiffs have stated a legally sufficient cause of action." Napoletano v. Cigna Healthcare of Connecticut, Inc., 238 Conn. 216, 232-33, 680 A.2d 127 (1996). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied ... Moreover ... [w]hat is necessarily implied [in an allegation] need not be expressly alleged." (Citation omitted.) Lombard v. Edward J. Peters, Jr., P.C., 252 Conn. 623, 626-27, 749 A.2d 630 (2000). When "it is apparent from the face of the complaint that the municipality was engaging in a governmental function while performing the acts and omissions complained of by the plaintiff, the defendant [is] not required to plead governmental immunity as a special defense and [may] attack the legal sufficiency of the complaint through a motion to strike." Brown v. Branford, 12 Conn.App. 106, 111 n. 3, 529 A.2d 743 (1987). "A motion to strike is the proper vehicle for resolving the issues of whether a cause of action is barred by governmental immunity and whether an exception to governmental immunity is sufficiently pleaded." Matthews v. Sklarz, Superior Court, judicial district of Hartford/New Britain at Hartford, Docket No. 582036 (February 25, 1999) (Hennessey, J.), citing Heigl v. Board of Education, 218 Conn. 1, 2-3, 587 A.2d 423 (1991); Eyon v. Andrews, 211 Conn. 501, 502-04, 559 A.2d 1131 (1989).

I.

*3 The defendants move to strike the first two ^{FN3} negligence counts on the ground that governmental immunity ^{FN4} bars the stated cause of action. In particular, the defendants maintain that they are immune from liability for their official, discretionary acts because the facts alleged do not give rise to the "identi-

liable person-imminent harm" exception to governmental immunity and, that the scenario presented by this case is guarded by the policy behind governmental immunity. In opposition, the plaintiff contends that the specific facts alleged impose a duty ^{FN5} on the defendants which they negligently breached by failing to adequately investigate, warn, advise and protect the plaintiff's decedent from Andrew Wilson. The plaintiff argues that the "identifiable person-imminent harm" exception to governmental immunity applies readily to the facts enumerated in the revised complaint.

FN3. In her memorandum objecting to the motion to strike, the plaintiff concedes that count one and count two should be merged. Therefore, the court will consider these counts simultaneously for purposes of analysis.

FN4. General Statutes § 52-557n(a) and (b) are the applicable provisions governing the context of immunity in this case. However, because § 52-557n simply codifies the common law rule that municipal officers are immune from liability for their negligence in the performance of discretionary functions; *Stewart v. Gothie*, Superior Court, judicial district of New London at New London, Docket No. 549831 (April 13, 2000) (Hurley, J.T.R.), and because the parties frame their arguments around the identifiable person-imminent harm cases, the court finds further discussion of § 52-557n unnecessary.

FN5. The plaintiff argues that the duty owed by the defendants to the plaintiff's decedent was private in nature and alternatively, even if the duty owed by the defendants was a public duty, the defendants are not immune from liability by application of the "identifiable person-imminent harm" exception to governmental immunity.

In deciding whether an action is barred by the doctrine of governmental immunity, "the court looks to see whether there is a public or private duty alleged by the plaintiff." *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 170, 544 A.2d 1185 (1988). "[I]f the

duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance must be a public and not an individual injury, and must be redressed if at all in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then neglect to perform it or to perform it properly, is an individual wrong and may support an individual action for damages." (Internal quotation marks omitted.) *Id.*, 166, 544 A.2d 1185. "If a public duty exists, an official can be liable only if the act complained of is a ministerial act, or one of the narrow exceptions to discretionary acts applies." *Id.*, 170, 544 A.2d 1185.

"[A]lthough the public duty doctrine provides the starting point of the analysis, *distinctions between discretionary acts and ministerial acts are often controlling without regard to whether the duty is ascertained to be public or private.*" (Emphasis added.) *Gordon v. Bridgeport Housing Authority*, *supra*, 208 Conn. 170. In outlining the scope of governmental immunity, the Connecticut Supreme Court has stated that "municipalities and their employees or agents have immunity from negligence liability for governmental acts involving the exercise of judgment or discretion." *Elliot v. Waterbury*, 245 Conn. 385, 411, 715 A.2d 27 (1998). "[A] municipal employee ..., has a qualified immunity in the performance of a governmental duty, but he may be liable if he misperforms a ministerial act, as opposed to a discretionary act." (Internal quotation marks omitted.) *Id.* See also *Purzycki v. Fairfield*, 244 Conn. 101, 107, 708 A.2d 937 (1998). "Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature ... [M]inisterial acts are performed in a prescribed manner without the exercise of judgment or discretion ..." (Internal quotation marks omitted.) *Id.* [W]here the duty of the public official to act ... involves the exercise of discretion, the negligent failure to act will not subject the public official to liability unless the duty to act is clear and unequivocal." *Gordon v. Bridgeport Housing Authority*, *supra* 208 Conn. 167.

The Connecticut Supreme Court has held that "the operation of a police department is a discretionary governmental function, and acts or omissions related to police functions ordinarily do not give rise to lia-

Not Reported in A.2d

Page 4

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

bility on the part of the municipality or a cause of action in tort against it.” *Gordon v. Bridgeport Housing Authority*, *supra*, 208 Conn. 180. The Superior Court has consistently held that acts or omissions of police officers in the exercise of their duties are discretionary in nature. See *Gonzalez v. City of Bridgeport*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 253464 (June 3, 1993) (Fuller, J.) (9 Conn.L.Rptr. 202) (holding that “[t]he investigation of crimes and decisions to make arrests for them is clearly a discretionary rather than a ministerial function”); see also, *Shaham v. Wheeler*, Superior Court, judicial district of Danbury, Docket No. 321879 (March 12, 1998) (Nadeau, J.); *Iulo v. City of Milford*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. 031055 (December 21, 1990) (Fuller, J.) (3 Conn.L.Rptr. 65). Consequently, “[h]ow far to investigate a complaint is a matter of police discretion and necessarily so. If the police were to employ exhaustive investigations in every complaint as a bureaucratic technique to avoid all future criticism or liability, the cost in intrusion on civil liberties would be intolerable in free society.” *Brown v. Dooling*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. 032598 (January 23, 1998) (Flynn, J.). Moreover, “[s]uits against municipalities or municipal employees raise the same policy considerations since municipalities only act through their employers.” *Lecy v. City of New London*, Superior Court, judicial district of New London, Docket No. 549544 (May 2, 2000) (Corradino, J.) (26 Conn.L.Rptr. 607).

*4 Applying the above stated principles to the present case, counts one and two of the plaintiff's revised complaint allege a duty on the part of the defendants to perform acts involving the exercise of discretion. The inherent governmental functions and duties of a police department are to field and receive complaints and information and then to act with discretion. See *Gordon v. Bridgeport Housing Authority*, *supra*, 208 Conn. 180. In this instance, after receiving information concerning Andrew Wilson, there was more than one way that the police defendants could react, and how and whether to pursue such information requires some exercise of judgment and discretion. This court finds that the Greenwich Police Department and the individual defendants, in performing police functions and enforcing the law, were carrying out discretio-

nary, governmental functions. Therefore, in order to sustain the legal sufficiency of the first two counts of the plaintiff's complaint, the allegations must fall within one of the recognized exceptions to qualified immunity for discretionary acts.

The courts have recognized three exceptions where an official can be held liable when performing a discretionary act. They are: “first, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ... second, where a statute specifically provides for a cause of action against a municipality or municipal officer for failure to enforce certain laws ... and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.” *Purzycki v. Fairfield*, 244 Conn. 101, 108, 708 A.2d 937 (1998). The only exception that is relevant to the present case is the first, identifiable person-imminent harm exception.^{FN6} This court finds that the plaintiff has alleged facts sufficient to invoke the identifiable person-imminent harm exception to governmental immunity, specifically, circumstances which made apparent to a public officer that his failure to act would likely subject an identifiable person to imminent harm.

FN6. Although the plaintiff's complaint refers to General Statutes §§ 17a-502 (commitment to hospital for psychiatric disabilities) and 53a-183 (harassment in the second degree), this reference does not implicate the second exception to governmental immunity because neither statutory provision imposes a duty on the defendants nor specifically provides for a cause of action against a municipality or municipal officer.

*5 Several decisions of the Supreme Court shed light on the proper application of the identifiable person-imminent harm exception. See, e.g., *Purzycki v. Fairfield*, 244 Conn. 101, 708 A.2d 937 (1998); *Burns v. Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994); *Evon v. Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989); *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 544 A.2d 1185 (1988); *Shore v. Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982); *Sestito v. Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979);^{FN7} See also *Colon v. City of New Haven*, 60

Not Reported in A.2d

Page 5

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

Conn.App. 178, 758 A.2d 900 (2000); Bonamico v. Middletown, 49 Conn.App. 605, 713 A.2d 1291 (1998).

FN7. In addition to the Supreme Court decisions, the court is cognizant of the explosion of school cases employing the identifiable person-imminent harm exception in the Superior Court. See *Cannato v. Board of Education*, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. 134260 (May 3, 1999) (D'Andrea, J.). Although the school cases provide for an unusual setting in that students are statutorily required to be in school and the education system has a duty to protect them; see *Burns v. Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994) and General Statutes § 10-184; the court concludes, nevertheless, that it must consider the entire scope of analysis in the overall context of the imminent harm exception to governmental immunity.

In *Sestito v. Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979), the plaintiff sought damages for the fatal shooting of her decedent during a public disturbance or melee in which she alleged that the defendant police officer was negligent in watching the disturbance while failing to do anything to prevent it. Viewing the evidence in the light most favorable to the plaintiff, the *Sestito* court set aside a directed verdict for the defendants, explaining that the facts regarding governmental immunity should go to a jury where there is "sufficient controversy over whether the defendant ... owed a duty to the plaintiff's decedent and breached it," regardless of whether the alleged duty arises from statutes, regulations, or the common law. *Id.*, 528, 423 A.2d 165. The fact that the plaintiff's decedent was one man among a mob of men did not compel the court to conclude that he was an insufficiently identifiable victim.

In *Shore v. Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982), the plaintiff administrator sought damages from the defendant town for the death of his decedent who was killed when her vehicle was struck by another car in which the driver was intoxicated. Approximately one hour before the collision, a town police officer stopped the intoxicated driver and after

telling him not to drive, the officer let the driver go. The plaintiff claimed that the officer was negligent in failing to enforce statutory prohibitions concerning reckless and intoxicated driving and that the decedent was an identifiable person subject to imminent harm. The *Shore* court concluded that the facts presented therein failed to show that the defendant officer could have been aware that the intoxicated driver's conduct threatened an identifiable victim with imminent harm.^{FN8} *Id.*, 153-54, 444 A.2d 1379. The *Shore* case turned on the undisputed fact that the victim was not identifiable to the police officer when he stopped the intoxicated driver.

FN8. In declining to find that the identifiable victim-imminent harm exception applied, the *Shore* court provided the following public policy analysis: "The adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society. Should the officer try to avoid liability by removing from the road all persons who pose any potential hazard, he may find himself liable in many instances for false arrest. We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary professional duty. Such discretion is no discretion at all." *Shore v. Stonington*, *supra*, 187 Conn. 157.

*6 In *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 544 A.2d 1185 (1988), the plaintiff, conservatrix of the estate of her brother, an incapable, sought damages from the defendants, a city, a housing authority and its commissioners, a former mayor, and a chief of police, for injuries suffered in a beating at a housing project. The plaintiff's brother allegedly encountered a group of youths and one youth grabbed his wallet and fled into a housing project. Two other youths allegedly lured the plaintiff's brother inside the project on the pretext that they would help him recover the wallet, then the youths physically beat him to a condition just short of death. The defendants moved to strike various counts of the plaintiff's complaint on the ground that the defendants owed no duty to protect the plaintiff's brother, by application of the doctrine of

Not Reported in A.2d

Page 6

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

governmental immunity. In declining to find that the plaintiff's brother was an identifiable person within a foreseeable class of plaintiffs, the *Gordon* court emphasized that "[a]ccording to the complaint, the police had no knowledge whatsoever of the robbery of [the plaintiff's brother], who made no attempt to notify the police, and who entered the project on his own. The facts of this case do not support the claim that [the plaintiff's brother] was even a remotely foreseeable plaintiff." *Gordon v. Bridgeport Housing Authority*, 208 Conn. 180. In affirming the granting of the defendants' motion to strike, *Gordon* held that the defendants had no duty to provide police protection to the plaintiff's brother specifically, as distinguished from its duty to the public generally, because there were no facts alleged supporting the claim that the plaintiff's brother belonged to a foreseeable class of plaintiffs. *Id.*, 180-82, 544 A.2d 1185.

The facts alleged in the present case, unlike *Shore v. Stonington*, *supra*, and *Gordon v. Bridgeport Housing Authority*, *supra*, satisfy the threshold requirement of an alleged identifiable victim because the complaint alleges that the plaintiff's decedent, Jack Peters, was identified by name to the defendants prior to the occurrence of the alleged harm. While it is true that Jack Peters was not the only identifiable victim according to the complaint, Jack Peters was clearly identified as a member of a small group of identifiable, potential victims which was limited to Jack, Todd and Dirk Peters. The existence of more than one identifiable victim does not preclude application of the identifiable person-imminent harm exception to governmental immunity. See *Sestito v. Groton*, *supra*, 178 Conn. 520, 423 A.2d 165 (plaintiff's decedent shot among mob of men considered sufficiently identifiable victim for purposes of governmental immunity exception); see also *Burns v. Board of Education*, *supra* 228 Conn. 646 ("We have construed [the identifiable person-imminent harm] exception to apply not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims"). The plaintiff's complaint is replete with factual allegations supporting her claim that Jack Peters was an identifiable victim within a foreseeable class of plaintiffs.

*7 In *Burns v. Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994), the Supreme Court shed light on what type of fact pattern characterizes "imminency" in

the context of the exceptions to governmental immunity. In *Burns*, the plaintiffs sought to recover from the defendants, a city, its board of education and the superintendent of schools when a student fell during school hours on an icy school courtyard. In reaching the conclusion that governmental immunity was not a defense in the *Burns* case, the court considered factors such as "the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care the seriousness of the injury threatened ... the duration of the threat of injury ... and whether the persons at risk had the opportunity to protect themselves." (Citations omitted.) *Id.*, 647-48, 638 A.2d 1. Regarding the imminency of the harm, the court found critical that "this accident could not have occurred at any time in the future; rather, the danger was limited to the duration of the temporary icy condition ... and the potential for harm ... was significant and foreseeable." *Id.*, 650, 638 A.2d 1.

In *Purzycki v. Fairfield*, 244 Conn. 101, 708 A.2d 937 (1998), another case illustrating the imminence requirement, the plaintiffs sought damages from the defendant school principal and board of education for injuries sustained by a student who was tripped by a fellow classmate in an unsupervised hallway during a lunch recess period. The *Purzycki* court first explained that "[t]he ultimate determination of whether qualified immunity applies is ordinarily a question of law for the court ... [unless] there are unresolved factual issues material to applicability of the defense ... [where] resolution of those factual issues is properly left to the jury." *Id.* 107-08, 708 A.2d 937. Because the material facts of the *Purzycki* case were undisputed, the question before the *Purzycki* court was deemed to be a question of law. *Id.*, 108 note 4, 708 A.2d 937. In finding that the student was subject to imminent harm, the *Purzycki* court reasoned that the exception to governmental immunity fit the facts of the case since the risk of harm was significant and foreseeable and "involve[d] a limited time period and limited geographical area, namely, the one-half hour interval when second grade students were dismissed from the lunchroom to traverse an unsupervised hallway on their way to recess." *Id.*, 110, 708 A.2d 937.

As highlighted by the Supreme Court's decisions in *Burns v. Board of Education*, *supra*, and *Purzycki v. Fairfield*, *supra*, the test for the imminent harm ex-

Not Reported in A.2d

Page 7

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

ception is whether there is "a foreseeably dangerous condition that [is] limited in duration and geographical scope." *Purzycki v. Fairfield*, *supra*, 244 Conn. 110. The plaintiff sufficiently alleges a dangerous condition, namely, that an identifiable person, the plaintiff's decedent, was being actively threatened and harassed by Andrew Wilson. Moreover, the plaintiff sufficiently alleges that this dangerous condition was foreseeable in that the defendants had specific notice of the threatening behavior and knew or should have known of the continuing threat to the plaintiff's decedent. Finally, the plaintiff sufficiently alleges a foreseeably dangerous condition that was limited in duration, to the period in which Andrew Wilson had returned to Connecticut at the end of July 1993 in order to "get on with the retribution," and limited in geographical scope, to the location of the plaintiff's decedent in relation to the location of Andrew Wilson within Greenwich, Connecticut. Therefore, this court finds that the facts alleged in counts one and two sufficiently allege the imminence requirement^{FN9} of the identifiable person-imminent harm exception.

FN9. This court is aware of other decisions construing the imminence requirement more narrowly. See, e.g., *Evon v. Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989) (court held that the plaintiffs' decedents were not subject to imminent harm because "the [harm] could have occurred at any future time or not at all"); *Kalina v. City of Waterbury*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 265812 (April 21, 1994) (Pittman, J.) (11 Conn.L.Rptr. 366, 9 C.S.C.R. 505) (court granted motion to strike because allegations that wife made one report to police that her estranged husband threatened to kill her and that he actually did so the next day were insufficient to meet the "imminence" prong). But see *Purzycki v. Fairfield*, *supra*, 244 Conn. 107-08 (resolution of unresolved factual issues material to applicability of qualified immunity defense properly left to jury); *Pagan v. Anderson*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 388804 (August 22, 1991) (Hennessey, J.) (4 Conn.L.Rptr. 428) (motion to strike denied where plaintiff's allegations sufficiently al-

leged identifiable person-imminent harm exception to governmental immunity because whether defendant's actions actually subjected identifiable person to imminent harm was factual issue to be determined by trier of fact); *Evon v. New Samaritan Family Housing*, Superior Court, judicial district of Waterbury, Docket No. 114969 (August 1, 1994) (Sylvester, J.) (on its face, complaint alleging that police officers failed to respond to report that plaintiff's decedent was screaming for help for one half hour was sufficient to invoke identifiable person-imminent harm exception to governmental immunity and to withstand motion to strike).

*8 Viewing the facts alleged in the complaint in the light most favorable to the plaintiff, this court finds that the plaintiff has alleged facts sufficient to invoke an exception to governmental immunity, specifically, that the defendants may have been aware of an identifiable victim who was in imminent danger. Stated differently, the plaintiff alleges in counts one and two of her complaint, facts that would, if proved, establish that it was apparent to the individual defendants that their failure to act would subject an identifiable person, the plaintiff's decedent, to imminent harm by Andrew Wilson. While the issue of governmental immunity may be decided as a matter of law on a motion to strike; *Gordon v. Bridgeport Housing Authority*, *supra*, 208 Conn. 170; the determination of whether the defendants' actions did in fact subject an identifiable person to imminent harm is a factual issue to be determined by the trier of fact. See *Purzycki v. Fairfield*, *supra*, 244 Conn. 107-08 (resolution of unresolved factual issues material to applicability of qualified immunity defense properly left to jury); see also *Pagan v. Anderson*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 388804 (August 22, 1991) (Hennessey, J.) (4 Conn.L.Rptr. 428) (motion to strike denied where plaintiff's allegations sufficiently alleged identifiable person-imminent harm exception to governmental immunity because whether defendant's actions actually subjected identifiable person to imminent harm was factual issue to be determined by trier of fact).

Therefore, because the plaintiff has alleged facts suf-

Not Reported in A.2d

Page 8

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

ficient to invoke the identifiable person-imminent harm exception to governmental immunity, the defendants' motion to strike counts one and two of the plaintiff's revised complaint is hereby denied.

*9 The defendants move to strike count five on the ground that it fails to state a claim upon which relief can be granted. Count five is directed only to First Selectman John Margenot, Jr. and Chief of Police Kenneth Moughty and is limited to the alleged negligence of their duty to supervise, direct and control the officers of the Greenwich Police Department. The plaintiff incorporated the detailed factual allegations of count one into count five to form the underlying basis. Both the plaintiff and the defendants reassert the same arguments as in count one with the defendant maintaining protection under discretionary governmental immunity and the plaintiff claiming that Margenot, Jr. and Moughty either owed a private duty or are subject to the identifiable person-imminent harm exception.

Again, in Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 180, 544 A.2d 1185 (1988), the court pronounced: "The deployment of officers is particularly a governmental function. Considerable latitude must be allowed to [a police chief] in the deployment of his officers, or in enforcing discipline. Indeed, because a police chief's authority to assign his officers to particular duties is deemed a matter that concerns the public safety, he may not be deprived of his power to exercise his own discretion and judgment as to the number, qualifications and identity of officers needed for particular situations at any given time ... We conclude that the general deployment of police officers is a discretionary governmental action as a matter of law." (Citations omitted; internal quotation marks omitted.)

The Superior Court has steadily followed this principle, specifically in motions to strike against allegations of negligent supervision of police. See Coletosh v. City of Hartford, Superior Court, judicial district of Hartford at Hartford, Docket No. 573462 (April 13, 1999) (Wagner, T.J.R.) (24 Conn.L.Rptr. 399) (negligent failure to instruct, supervise, control and discipline officers are governmental acts as a matter of law); Hubbard v. City of New Britain, Superior Court, judicial district of Hartford-New Britain at New Brit-

ain, Docket No. 469204 (January 30, 1996) (Arena, J.) (granting motion to strike complaint alleging negligent training of police officer regarding high speed chases because such action is discretionary and protected by governmental immunity); Doe v. Nunes, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. 463832 (April 15, 1995) (Handy, J.) (granting motion to strike complaint alleging negligent hiring, supervising and firing of officer because such actions are discretionary duties protected by governmental immunity); Cook v. City of Hartford, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 362482 (August 21, 1992) (Aurigemma, J.) (7 Conn.L.Rptr. 270, 7 C.S.C.R. 1096, 1097) ("The act of training and supervising police officers is clearly a discretionary governmental function. Consideration of who to hire, how to train such people, and how to supervise police officers on the job are decisions requiring the use of judgment and discretion"); Brimage v. Willis, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. 438572 (June 18, 1991) (Aronson, J.) (4 Conn.L.Rptr. 634, 6 C.S.C.R. 682) (same).

Here, count five is comprised of the subordinate facts from count one and defendants Margenot, Jr. and Moughty are subject to the same governmental immunity analysis that was conducted for purposes of counts one and two. Thus, this court finds that the defendants named in count five were performing discretionary acts and are immune from negligence liability unless an exception from such immunity applies. See Gordon v. Bridgeport Housing Authority, *supra* 208 Conn. 161, 180-83, 544 A.2d 1185 (recognizing potential applicability of identifiable person-imminent harm exception to governmental immunity for discretionary, supervisory acts of police officials where appropriate facts are alleged); Pagan v. Anderson, superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 388804 (August 22, 1991) (Hennessey, J.) (4 Conn.L.Rptr. 428) (stating: "[t]he use of police officers to serve arrest warrants is encompassed within the term 'general deployment of police officers,' which was found to be a discretionary governmental action as a matter of law in Gordon [v. Bridgeport Housing Authority, supra]. The plaintiff has sufficiently alleged an exception to the rule of immunity that the defendants' actions subjected an identifiable person ... to imminent harm ... Accor-

Not Reported in A.2d

Page 9

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

dingly, the defendants' motion to strike is denied"); see also *Gervais v. West Hartford Board of Education*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 555396 (July 25, 1996) (Lavine, J.) (17 Conn.L.Rptr. 383) (decisions regarding hiring, training and supervision of employees are discretionary but governmental immunity is not applicable because of imminent harm exception); *Clarke v. Fountain*, Superior Court, judicial district of Hartford-New Britain at New Britain, Docket No. 468877 (October 12, 1995) (Handy, J.) (governmental immunity for discretionary acts inapplicable where plaintiff sufficiently alleges that defendant's negligent supervision subjected identifiable person to imminent harm). As a result, and utilizing the facts of the revised complaint, the plaintiff has pled sufficient facts to allege that it was apparent to these two supervising defendants that the plaintiff's decedent was an identifiable person subject to imminent harm. Therefore, the plaintiff has sufficiently alleged an exception to governmental immunity for discretionary acts and, accordingly, the defendants' motion to strike count five of the plaintiff's revised complaint is hereby denied.

II.

*10 The defendants move to strike count seven on the ground that it fails to state a claim upon which relief may be granted. Count seven alleges that the individually named defendants' ^{FN10} actions and/or omissions violated the deceased's right to due process of law under article first, § 8, of Connecticut's constitution. ^{FN11} The defendants argue that neither the Connecticut legislature nor the Connecticut Supreme Court has authorized a cause of action permitting relief in the form of monetary damages for alleged violations of this constitutional right, and that therefore, a purported cause of action based on the due process clause of the state constitution does not lie. The defendants primarily rely on *Kelley Property Development, Inc. v. Lebanon*, 226 Conn. 314, 627 A.2d 909 (1993), arguing that this decision declining to recognize a cause of action under article first, § 8, of the Connecticut constitution controls the present case. The plaintiff cites *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 (1998), arguing that this court has the power to create such a cause of action.

^{FN10}. The individual defendants named in count seven are: John Margenot, Jr., Kenneth Moughty, John Campbell and Roger Wachnicki.

^{FN11}. Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall ... or property without due process of law ... be deprived of life, liberty or property without due process of law ..."

In *Binette*, the court recognized a private cause of action for money damages for violations of article first, Sections seven and nine of the state constitution based on an alleged unreasonable search and seizure and unlawful arrest by defendant municipal police officers. See *Binette v. Sabo*, *supra*, 244 Conn. 49-50. The *Binette* court relied on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in which the United States Supreme Court concluded that federal courts possess the power to create a private cause of action for money damages directly under the federal constitution. See *Binette v. Sabo*, *supra*, 244 Conn. 33. The *Binette* court "emphasize[d] that our decision to recognize a *Bivens*-type remedy in this case does not mean that a constitutional cause of action exists for every violation of our state constitution." (Emphasis added.) *Id.*, 47. Accordingly, the *Binette* court held that "[w]hether to recognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis ... [T]hat determination will be based on a multifactor analysis. The factors to be considered include: the nature of the constitutional provisions at issue; the nature of the purported unconstitutional conduct; the nature of the harm; *separation of powers considerations* and the other factors articulated in *Bivens* [*supra*, 403 U.S. 396] and its progeny; *the concerns expressed in Kelley Property Development, Inc.* [*supra*, 226 Conn. 314]; and any other pertinent factors brought to light by future litigation." (Emphasis added.) *Binette v. Sabo*, *supra*, 244 Conn. 48. Thus, *Binette* instructs this court to consider the concerns expressed by the United States Supreme Court in *Bivens* and its progeny, and reaffirms the concerns expressed by the Connecticut Supreme Court in *Kelley*.

Not Reported in A.2d

Page 10

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

*11 Subsequent to its decision in *Bivens*, the United States Supreme Court explained that it "implied a cause of action against federal officials in *Bivens*, in part, because a direct action against the Government was not available ... [T]he purpose of *Bivens* is to deter the officer." (Emphasis in original.) *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Furthermore, the United States Supreme Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." (Citations omitted; internal quotation marks omitted.) *Id.*, 484.

In *Kelley*, the Connecticut Supreme Court declined to recognize a cause of action under article first, § 8, of the Connecticut constitution for damages for violations of state due process rights by state or local governmental officials. *Kelley Property Development, Inc. v. Lebanon*, *supra*, 226 Conn. 314, 627 A.2d 909. In addition, no appellate court in Connecticut has recognized a cause of action under article first, § 8, of the state constitution. See *id.*, 330-31, 627 A.2d 909. The Kelly the court explained that "[t]he several sister jurisdictions that have addressed the issue of whether to recognize a state *Bivens* action have pursued varying methods of analysis, with varying results. In a significant number of cases, however, the focus has been on the presence or absence of an existing alternative remedy, either by way of statute or under the common law, to provide some measure of relief for the injured party." *Id.*, 338, 627 A.2d 909. "Our examination of these cases leads us to conclude that, as a general matter, we should not construe our state constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy. This conclusion accords with the constitutional principle of separation of powers and its requirement for judicial deference to legislative resolution of conflicting considerations of public policy." (Emphasis added.) *Id.*, 339, 627 A.2d 909.

*12 Recent decisions by Connecticut's Supreme and Superior Courts have similarly continued the refusal to recognize a private cause of action for damages pursuant to article first, § 8, of the Connecticut constitution, granting a motion to strike such allegations. See *ATC Partnership v. Town of Windham*, 251 Conn. 597, 612-17, 741 A.2d 305 (1999), cert. denied, 530

U.S. 1214, 120 S.Ct. 2217, 147 L.Ed.2d 249 (2000) (trial court correctly determined allegations in plaintiff's complaint were insufficient to state a cause of action under due process clause of state constitution; remedies afforded plaintiff by statutory and common law were sufficiently compensatory to obviate need for judicial recognition of freestanding tort claim under article first, § 8, of Connecticut's constitution); *Bazzano v. City of Hartford*, Superior Court, judicial district of Hartford at Hartford, Docket No. 584611 (November 17, 1999) (Peck, J.) (granting police defendant's motion to strike plaintiff's claim under article first, § 8, of Connecticut's constitution).

Applied here, the plaintiff has not alleged facts sufficient to be recognized as a claim for which relief can be granted. As discussed throughout this decision, the plaintiff has available common law and statutory avenues with which to seek adequate redress. Moreover, this court will not overstep its bounds, legislate, and create a new cause of action under article first, § 8, of the Connecticut constitution, thereby traversing the separation of powers doctrine. The weight of authority runs contrary to such a step. Therefore, the defendants' motion to strike count seven of the plaintiff's revised complaint is hereby granted.

III.

*13 The defendants move to strike counts three, four, six and eight of the plaintiff's revised complaint on the ground that they do not state claims upon which relief may be granted. The basis for all four counts is an indemnity claim against the Town of Greenwich pursuant to both *General Statutes* §§ 7-465^{FN12} and 7-101a.^{FN13} All four counts plead the underpinning facts by incorporation. Count three's indemnity claim is against all the individual defendants as a result of their alleged negligence while in the scope of their employment. Count four is simply a composite of counts one, two and three. Count six's indemnity claim is based on the alleged negligent supervision theory stated in count five against defendants First Selectman John Margenot, Jr. and Chief of Police Kenneth Moughty. Count eight's indemnity claim is based on the constitutional cause of action asserted in count seven under article first, § 8, of the Connecticut constitution. The defendants maintain that an action under § 7-465 must be derived from a valid underlying claim

Not Reported in A.2d

Page 11

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

against the individual employee and that no direct right of action exists under § 7-101a for a person who is not an employee or officer of a municipality such as the plaintiff. The plaintiff insists she has alleged sufficient statutory causes of action.

FN12. Section 7-465 provides in relevant part: "Assumption of liability for damage caused by employees ... (a) Any town, city or borough, ... general, special or local, shall pay on behalf of any employee of such municipality, ... all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as hereinafter set forth, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment ... Governmental immunity shall not be a defense in any action brought under this Section ..."

FN13. Section 7-101 a provides in relevant part: "Protection of municipal officers and municipal employees from damage suits ... (a) Each municipality shall protect and save harmless any municipal officer whether elected or appointed, of any board, committee, council, agency or commission, ... or any municipal employee, of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer or such employee while acting in the discharge of his duties ... (d) No action shall be maintained under this Section against such municipality or employee ... unless written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued."

"A plaintiff bringing suit under General Statutes § 7-465 first must allege in a separate count and prove the *employee's* duty to the individual injured and the breach thereof. Only then may the plaintiff go on to allege and prove the town's liability by indemnification. This is a personal liability requirement that calls for an inquiry independent of the statute itself, an inquiry into the factual matter of *individual negligence*... Thus, in a suit under § 7-465, any municipal liability which may attach is predicated on prior findings of individual negligence on the part of the employee and the municipality's employment relationship with that individual." (Citations omitted; emphasis in original; internal quotation marks omitted.) Wu v. Fairfield, 204 Conn. 435, 438, 528, A.2d 364 (1987). "While § 7-465 provides an indemnity to a municipal employee from his municipal employer in the event the former suffers a judgment ... [t]he municipality's liability is derivative." (Citations omitted; internal quotation marks omitted.) Kaye v. Manchester, 20 Conn.App. 439, 443-44, 568 A.2d 459 (1990). See also Lecy v. City of New London, Superior Court, judicial district of New London at New London, Docket No. 549544 (May 2, 2000) (Corradino, J.) (26 Conn.L.Rptr. 607); Elinsky v. Marlene, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 557659 (October 31, 1997) (Hale, J.T.R.); Iulo v. City of Milford, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. 031055 (December 21, 1990) (Fuller, J.) (3 Conn.L.Rptr. 65).

Section 7-465 of the General Statutes explicitly provides for an action against the municipality and its employee jointly.^{FN14} "[T]he provisions of § 7-465 which permit an action to be maintained against the municipality and the employee jointly do not mean that a plaintiff may not proceed against the employee alone if for any reason the plaintiff cannot prevail upon the count alleging facts to support a recovery from the municipality of any judgment obtained against the employee. Fraser v. Henninger, 173 Conn. 52, 57, 376 A.2d 406 (1977); see also Rowe v. Godou, 209 Conn. 273, 278-79, 550 A.2d 1073 (1988).

FN14. The portion of Section 7-465 that is relevant here provides: "No action for personal physical injuries or damages to real or personal property shall be maintained against

Not Reported in A.2d

Page 12

Not Reported in A.2d, 2001 WL 51671 (Conn.Super.), 28 Conn. L. Rptr. 671

(Cite as: 2001 WL 51671 (Conn.Super.))

such municipality and employee jointly unless such action is commenced within two years after the cause of action therefor arose nor unless written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued ...*In any such action the municipality and the employee may be represented by the same attorney...* (Emphasis added.)

*14 "Section 7-101a(a) requires a municipality to indemnify any municipal officer or full-time municipal employee for any financial loss resulting out of claims of negligence on the part of such officer or employee while acting in discharge of his duties. The City's liability under this statute is also limited to indemnification." *Iulo v. City of Milford*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. 031055 (December 21, 1990) (Fuller, J.) (3 Conn.L.Rptr. 65). The title of § 7-101a makes clear that it is designed for the "[p]rotection of municipal officers and municipal employees from damage suits ..." General Statutes § 7-101a. Thus, § 7-101a is very meaningful to the class of people sought to be protected-employees and officers of municipalities, towns and cities. "Section § 7-101a was not passed to give a direct cause of action to anyone else." (Emphasis added.) *Parsons v. West Hartford Board of Education*, Superior Court, judicial district of Hartford, Docket No. 533484 (September 16, 1994) (Corradino, J.) (13 Conn.L.Rptr. 52).

In light of the above, this court finds that counts three, four and six of the plaintiff's revised complaint sufficiently allege causes of action in compliance with the requirements of § 7-465. Counts three, four and six are derived from valid underlying claims against the individual defendants as these counts are premised upon counts one, two and five, respectively. "Having found that the individual defendants are not shielded by the doctrine of governmental immunity, and for that reason, having denied the defendants' motion to strike counts [one, two, and five,] the court further finds that the motion to strike the indemnity counts [premiered upon such counts] should be and is therefore denied." *LaChance v. City of Waterbury*, Superior Court,

judicial district of Waterbury. Docket No. 148936 (February 29, 2000) (Doherty, J.). Stated differently, since the underlying claims against the individual defendants in counts one, two and five were sustained by virtue of the identifiable person-imminent harm exception, and since the indemnification sought in counts three, four and six under § 7-465 is derived from those claims, counts three, four and six sufficiently allege causes of action under § 7-465. Accordingly, the defendants' motion to strike counts three, four and six of the plaintiff's revised complaint is hereby denied.

However, since count eight's underlying claim is based on the stricken constitutional cause of action asserted in count seven, and since the indemnification sought in count eight under § 7-465 is to be derived from that stricken count, such cause of action is unsupported and fails to state a claim upon which relief may be granted. Moreover, the plaintiff cannot advance count eight as a direct cause of action against the Town of Greenwich under § 7-101a. Accordingly, the defendants' motion to strike count eight of the plaintiff's revised complaint is hereby granted.

*15 Wherefore, for all the reasons discussed above, the defendants' motion to strike counts one, two, three, four, five and six of the plaintiff's revised complaint is hereby denied, and the defendants' motion to strike counts seven and eight of the plaintiff's revised complaint is hereby granted.

Conn.Super.,2001.

Peters ex rel. Estate of Peters v. Town of Greenwich
Not Reported in A.2d, 2001 WL 51671 (Conn.Super.),
28 Conn. L. Rptr. 671

END OF DOCUMENT

The Plaintiff now moves for summary judgment on the First, Third, Fifth and Sixth Causes of Action stated against the Defendants O'Hare and Pia, and against the City of Hartford in the Eighth Cause of Action of the Complaint for indemnification only of the defendants O'Hare's and Pia's actions, pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465.

Should the Court grant summary judgment in favor of the defendants O'Hare and Pia thus determining that said defendants are not liable to the plaintiff for any alleged damages, there can be no damages for which the municipality is obligated to pay on behalf of O'Hare and Pia pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465, and judgment should accordingly enter in the defendant City's favor.

II. LAW AND ARGUMENT

In opposition to the Plaintiff's Motion, the defendant City of Hartford adopts the defendants Johnmichael O'Hare's and Anthony Pia's Motion for Summary Judgment, their Local Rule 56(a)1 Statement of Material Facts, and all supporting exhibits attached thereto, including the Defendant City of Hartford's Motion for Summary Judgment, its Local Rule 56(a)1 Statement of Material Facts, and the exhibit attached thereto.

In addition, in opposition to the Plaintiff's Motion, the Defendant City of Hartford adopts the defendants Johnmichael O'Hare and Anthony Pia's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, the Defendants O'Hare and Pia's Local Rule 56(a)2 Statement of Material Facts and supporting materials and the City of Hartford's Local Rule 56(a)2 Statement of Material Facts attached hereto.

III. CONCLUSION

For all of the reasons more particularly set forth in the defendants O'Hare and Pia's memorandum of law in opposition and other supporting documents, including O'Hare and Pia's Local Rule 56(a)2 Statement and the Local Rule 56(a)2 Statement of the City of Hartford, as well as the reasons and arguments set forth in the Defendants' Motion for Summary Judgment and documents filed in support thereof, summary judgment should enter in favor of O'Hare and Pia on the First, Third, Fifth and Sixth Causes of Action and therefore summary judgment should likewise enter in favor of the Defendant City of Hartford on the Eighth Cause of Action. Plaintiff's motion for summary judgment should therefore be denied.

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
It's Attorney
550 Main Street
Hartford, CT 06103
Federal Bar No. ct17217
Telephone (860) 757-9700
Facsimile (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION

This is to certify that on August 31, 2009, a copy of the foregoing Motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Thomas Gerarde, Esq.
Alan R. Dembiczak, Esq.
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. :	NO.: 3:08CV01644(RNC)
as Guardian for K.H., a minor child :	
:	
v. :	
:	
JOHNMICHAEL O'HARE, :	
ANTHONY PIA, and :	
CITY OF HARTFORD :	AUGUST 31, 2009

DEFENDANT CITY OF HARTFORD'S
LOCAL RULE 56(a)2 STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56(a)(2), the defendant City of Hartford respectfully submits its Local Rule 56(a)2 Statement of Material Facts, and responds to the Plaintiff's Local Rule 56(a)1 Statement filed in support of his motion for summary judgment, as follows:

Paragraphs 1 – 37. The Defendant City of Hartford adopts and incorporates herein by reference the responses provided by the Defendants Johnmichael O'Hare and Anthony Pia, in their Local Rule 56(a)2 Statement of Material Facts in Opposition to Plaintiff's Motion for Summary Judgment, as well as any exhibits referred to therein, as if fully set forth herein.

Paragraph 38. Admit.

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
It's Attorney
550 Main Street
Hartford, CT 06103
Federal Bar No. ct17217
Telephone (860) 757-9700
Facsimile (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION

This is to certify that on August 31, 2009, a copy of the foregoing Local Rule 56(a)(1) Statement of Material Facts was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates
108 Oak Street
Hartford, CT 06106-1514

Thomas R. Gerarde
Alan R. Dembiczak
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A. as guardian for K.H., a minor child, Plaintiffs,	:	CIVIL ACTION NO.
	:	
	:	
V.	:	3:08CV01644(RNC)
	:	
JOHNMICHAEL O'HARE, ET AL.	:	
Defendants.	:	AUGUST 31, 2009

**OBJECTION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the plaintiffs, by and through undersigned counsel, hereby object to the defendants' motion for summary judgment dated August 10, 2009. In support hereof, the plaintiffs submit that there are genuine issues of material fact that preclude the entry of summary judgment against the plaintiffs on any of their claims. In opposition thereto, the plaintiffs submit a memorandum of law, a Rule 56(a)2 statement and accompanying exhibits 18-21, including:

SJ-18	George Hemingway Affidavit
SJ-19	K.H. Deposition Excerpts
SJ-20	Kathleen Deering Affidavit and Necropsy Report
SJ-21	Glen Harris Deposition Excerpts

The plaintiffs also incorporate by reference all materials submitted in support of their own motion for partial summary judgment submitted on August 10, 2009.

WHEREFORE, the Plaintiffs request the court to deny defendants' motion.

THE PLAINTIFF,
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
JON L. SCHOENHORN
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
Fed Bar #ct00119
(860) 278-3500
Fax: (860) 278-6393
Email: Civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO.
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	3:08CV01644(RNC)
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	AUGUST 31, 2009

**MEMORANDUM IN OBJECTION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The plaintiff, Glen Harris, individually and as guardian for K.H., a minor child, hereby submits this memorandum of law in objection to the motions by defendants Johnmichael O'Hare, Anthony Pia, and the City of Hartford's for Summary Judgment. The plaintiffs filed a motion for partial summary judgment with their own Local Rule 56(a)1 statement of undisputed material facts and a memorandum of law on August 10, 2009. Those arguments and facts stated therein are incorporated herein by reference.

I. FACTS OF THE CASE

The plaintiffs, to a certain extent, will rely on those facts set forth in their Memorandum in Support of Summary Judgment ("Aug. 10 Memorandum") filed August 10, 2009. However, since plaintiffs were required to use defendants' version of facts for obtaining summary judgment, certain facts remain in dispute. In particular, the plaintiffs noted that they disagreed with paragraphs 13-20 of their Local Rule 56(a)(1) statement, and note that the source of any tip regarding weapons stored in an abandoned vehicle on the plaintiffs' property did not come from a Mr. George Hemingway. Since the defendants were not privy to any conversation pertaining to the source of such information, then it must be deemed anonymous. The following additional facts, however, are material to defendants' arguments:

The plaintiffs' St. Bernard dogs were good-tempered and obedient dogs. Glen Harris Aff., Ex. SJ-9.¹ They never bit anyone and listened to the plaintiff when he gave commands. *Id.* K.H., the minor plaintiff, developed a special relationship with one of her dogs, named "Seven." She felt she could talk to him and that he would listen, understand, and comfort her in a way that no one else could. K.H. Dep., Ex. SJ-19 p. 49, lines 12-18.

On December 20, 2006, O'Hare and Pia drove to 297 Enfield Street based solely upon anonymous information conveyed by Laureano about guns being stored in an abandoned vehicle. There are no police communication or dispatch records to document or substantiate the reason for the defendants' decision to go to 297 Enfield Street. Ex. SJ-2, p. 27, lines 6-20; p. 39 line 25, p. 40, lines 1-5; Ex. SJ-3, at 30, line 8-15; p. 32, lines 5-15; Ex. SJ-4, p. 35, lines 17-24; p. 62, lines 8-15; p. 66, lines 4-8; Ex. SJ-11; Ex. SJ-12; Ex SJ

That afternoon, K.H. returned home from school and brought Seven, one of the plaintiffs' two St. Bernard dogs, into the backyard. K. H. Dep., Ex. SJ-14, p. 15 lines 9-12. When the defendants entered the yard at approximately 3:22 p.m., K. H. was standing in the rear yard near the house with Seven. Ex. SJ-1, p. 59 lines 16-25; Ex. SJ-14, at 15 lines 9-12. As the defendants rounded the rear corner of the house, they gained a partial view of the back yard and saw the St. Bernard dog in a corner of the yard. Ex. SJ-2, p. 55, lines 13-21; Ex. SJ-3 p. 52 lines 20-25. The dog began to move toward the defendants and the defendants turned and ran back the way they entered along the north side of the house, towards the front yard. Ex. SJ-2, p. 63, line 11 to p.

1

The plaintiffs incorporate by reference all exhibits filed with their motion for partial summary judgment filed August 10, 2009, and will refer to the exhibits previously filed with their motion for partial summary judgment when possible. New exhibits by the plaintiffs will continue the sequence, commencing "SJ-18."

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

66, line 14; Ex SJ-3 at 56, line 12 to p. 57, line 25. K.H. ran around the south side of the house in an effort to head off Seven's path through the front yard. K.H. Dep., Ex. SJ-19, p. 21, lines 1-14. Pia ran across the front yard, onto the driveway, and around the chainlink fence surrounding the front yard. Once outside the property, he turned back to see O'Hare standing in the middle of the front yard, telling the dog to stop as it approached him. Ex. SJ-2, p. 64, line 13 - p. 65, line 9; Ex SJ-3 at 56, line 12 to p. 57, line 25. O'Hare then fired two shots at the dog. Ex SJ-19, p.26, lines 10-23. K.H. heard two shots before she came around the house. When K.H. arrived at the front yard, she saw O'Hare standing over Seven, who had fallen to the ground but was still alive and breathing heavily with his tail wagging weakly. Ex. SJ-14, p. 30, lines 2-14. K.H. screamed "don't shoot my dog." *Id.*, at p. 29, lines 17-24. O'Hare looked at K.H., then back to the dog, and shot the dog in the head. *Id.* Although there were two other bullet wounds in the dog's body, it was the third bullet to the brain that caused the dog's death. Affidavit and Necropsy Report, Ex. SJ-20. K.H. ran to the body of her pet, screaming and crying. Ex. SJ-14, p. 35, lines 1-17; SJ-3, p. 64 line 23 to p.65 line 9. O'Hare then told K.H., "Sorry, miss, but your dog isn't going to make it." Ex. SJ-14, p. 35, lines 1-17

K.H. was subsequently hospitalized for suicidal thoughts driven, in part, by her guilt and sadness over Seven's death. SJ-19, p. 44, lines 23-25; 45, lines 1-8; p. 46, lines 11-15; p.47, lines 7-14; p. 48 1-15; p. 49, lines 1-18; Glen Harris Dep., Ex. SJ-21, p. 91, lines 16-25; p. 92, lines 1-15.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

II. LAW AND ARGUMENT

A. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” When deciding a motion for summary judgment, the court must construe the evidence in the light most favorable to the non-moving party and resolve all ambiguities and draw all inferences in favor of that party. *Doro v. Sheet Metal Workers’ Int. Ass’n.*, 498 F.3d 152, 155 (2d Cir. 2007).

The defendants here bear the initial burden of demonstrating that no factual issue exists and that they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). In ruling on a motion for summary judgment,

[t]he inquiry performed is the threshold inquiry of determining whether there is a need for a trial - whether, in other words, there are any factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The movant must demonstrate the absence of a genuine issue of material fact. If the movant carries this burden, the burden then shifts to the non-moving party to produce concrete evidence sufficient to establish a genuine unresolved issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. at 322-24. The court then must view the facts in the light most favorable to the non-movant and give that party the benefit of all reasonable inferences from the evidence that can be drawn in that party's favor. See *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000). The court neither weighs evidence nor resolves material factual issues but only determines

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

whether, after adequate discovery, any such issues remain unresolved because a reasonable fact finder could decide for either party. See *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249; *Gibson v. Am. Broad. Corp.*, 892 F.2d 1128, 1132 (2d Cir. 1989). Summary judgment is unwarranted where there are disputes as to facts material to a question. *Papineau v. Parmley*, 465 F.3d 46, 63-64 (2d Cir. 2006). However, neither conclusory statements, conjecture, nor speculation suffice to either support or defeat summary judgment, and, therefore, the subjective beliefs and asserted motives of the defendants may not be considered. See, *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir.1996).

B. THE PLAINTIFFS HAD A REASONABLE EXPECTATION OF PRIVACY IN THEIR REAR YARD BECAUSE IT WAS CURTILAGE, THE DEFENDANTS' ENTRY INTO THEIR YARD WAS AN UNREASONABLE SEARCH, AND THE KILLING OF THE DOG CONSTITUTED AN UNREASONABLE SEIZURE.

1. A Search is Unreasonable if it Violates the Plaintiffs' Expectation of Privacy.

The Plaintiffs have previously set forth the general fourth amendment law on warrantless searches and seizures in their August 10th memorandum. The constitutional limitation that searches and seizures be "reasonable" is to "impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard individual privacy against arbitrary government intrusions." *Phaneuf v. Franklin*, 448 F.3d 591, 595 (2d Cir. 2006). The prohibition protects against unconstitutional invasions of the "right of personal security [and] personal liberty." *Boyd v. United States*, 116 U.S. 616, 630 (1886). A court must "balance the intrusiveness of the search [or seizure] . . . against its promotion of legitimate government interests." *Security Law Enforcement Employees v. Carey*, 737 F.2d 187, 201 (2d Cir. 1984). The subjective intent of police officers is not relevant to the decision whether a search or seizure

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

is reasonable. *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006).

Any intrusion that interferes with an individual's reasonable expectation of privacy violates the constitution. *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980). The fourth amendment expressly protects against unreasonable searches and seizures in the home, and, in order to be reasonable, and except in rare exceptions, requires the issuance of a warrant. *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 619 (1989). Given that the requirement for warrants establishing probable cause to search a home is set out in the language of the constitution itself, the law in this area is, beyond all doubt, clearly established. *Groh v. Ramirez*, 124 S.Ct. 1284, 1293-94 (2004) (failure of warrant to state with particularity the item to be seized constituted plain fourth amendment violation).

2. The Rear Yard of the Plaintiffs' Home Constituted Curtilage.

In their memorandum, the defendants do not claim that they had any legitimate reason to justify their warrantless entry. Instead they argue that the plaintiffs had no reasonable expectation of privacy in the area invaded, because the yard surrounding the plaintiffs' home was not curtilage. If the defendants were correct, and the plaintiff's enclosed back yard was not curtilage, then it would have to be an "open field" which is defined as "any unoccupied or undeveloped area outside of the curtilage." *Oliver v. United States*, 466 U.S. 170, 180 n. 11 (1984). However, the defendants do not press that claim.

The defendants base their constrained reasoning that the plaintiffs have no reasonable expectation of privacy on several disputed and/or immaterial assertions, including that they could see through the chain link fence into the front yard and, perhaps with x-ray vision, through the walls of the plaintiff's house, into the back yard; there were gaps in the fence; there were no fences separating the front and back yards; and the plaintiffs *appeared* to live in a multi-family

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

home. The problem with defendants' arguments is that they not only rely on facts that are disputed, but that their own version is unsupported and utterly devoid of a basis – disputed or not – in the record. For example, the plaintiffs' residence was certainly not a multi-family house, and there were no "gaps" in the fence other than for the driveway. Moreover, the defendants admit that they entered the plaintiffs' property precisely because they could not tell from any lawful location whether there was a vehicle – abandoned or not – in the rear yard. They obviously did not see the dog, nor did they see K.H., who was standing in the back with the dog. The photographs presented demonstrate that the rear yard could only been seen with satellite cameras. Moreover, defendants offer no evidence to contradict Glen Harris' statement that he used the back yard to entertain, to relax and for his young daughter to play in.

If these disputed issues are not enough to deny the defendants' motion, there are additional claims set forth in the plaintiff's original memorandum, Part IV.A, which analyzed the plaintiffs' privacy interests as undisputed under the factors set forth in *United States v. Dunn*, 480 U.S. 294, 300 (1987) (viewing contents of barn from outside curtilage did not constitute a search). Moreover, the defendants' argument must fail for additional reasons:

The defendants appear not to understand what an expectation of privacy is, relegating their analysis to whether a front along the street is opaque or chain link, or whether a homeowner must install a second fence between the front and rear yard to deter intruders to justify a privacy interest. This is sheer nonsense. In the seminal case of *Katz v. United States*, 389 U.S. 347 (1967), the manifestation of a subjective expectation of privacy that society would find reasonable had nothing to do with whether the police could observe from a lawful location the fact that Mr. Katz was talking inside a telephone booth. Instead, the question was whether they could hear the conversation from a lawful location without resort to a wiretap. Clearly they could not. The

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

defendants' argument is as meritless as a claim that if an officer can see into a home's picture window from the sidewalk, then he can break into that house without a warrant to look for evidence, because, somehow, the homeowners have lost any expectation of privacy by having a window.

Thus the defendants fail to address the expectation of privacy that a property owners has. In *State v. Sealy*, 208 Conn. 689, 693 (1988), for example, the Connecticut Supreme Court examined what portions of a multi-family residence (which is *not* the case here) are within the "protected zone of privacy in [a] dwelling." The court in that case was analyzing the reach of Conn. Gen. Stat. § 53-206(a) (carrying a dangerous weapon), while recognizing that the offense did not apply to the carrying of weapons "in an individual's residence or abode." While the Court ultimately concluded in that case that a "common stairway and landing" in a multi-unit dwelling is not part of the residence because the defendant in that case "did not have the exclusive use of the area between the second and third floor apartments, as he did not have the legal right to control access and to exclude others," *id.*, such factors weigh heavily in plaintiffs' favor in the instant case.

Here there is no dispute that the plaintiffs were the sole occupants of 297 Enfield Street in Hartford despite the defendants' utterly uncorroborated and misleading statement about a "multi-family" residence. The plaintiffs, as the only occupants, clearly had a right to exclude *all* others from their yard, regardless of whether or not Glen Harris *could have* rented part of it to another family. In contrast, the defendant in *Sealy*, "may have been the principal user of the third floor landing and stairway, [but] other individuals, however infrequent their use, also had a right to use that area." *Id.* at 694, citing *State v. Reddick*, 207 Conn. 323, 334 n. 5 (1988). *See also, State v. Campbell*, 116 Conn. App. 440, 446-47 (2009). *See, also, United States v. Holland*, 755 F.2d

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

253, 255-56 (2d Cir. 1985) (legitimate expectation of privacy of apartment tenant exists only in an area subject to the tenant's exclusive control); *State v. Brocuglio*, 64 Conn. App. 93, 103-104 (2001). Here, no one else had the right to use the property.

The defendants' argument that they could see over (or through) the chain link fence in the front yard from the public sidewalk is irrelevant since there is no claim about police impropriety in the front yard. The officers did not walk to the front door of the home and observe suspicious activity or evidence in "plain view." *United States v. Titemore*, 437 F.3d 251, 259 (2d Cir. 2006) (no expectation of privacy in portion of home's "curtilage" that is "visible to and used by the public" to approach the home's entrance). The defendants did not see any weapons or even a vehicle, let alone one that met the description in the anonymous "tip." In fact, the defendants' sole asserted justification for the warrantless invasion of the property is that they *could not see* what was in the backyard and wanted to investigate. A citizen does not have to build an opaque wall of brick and mortar with a moat and draw bridge, like the proverbial lords of a medieval castle, to assert the right to privacy in their own back yard. The questions presented are: whether the plaintiffs possessed the right to exclude others; and whether these plaintiffs had a reasonable expectation of privacy in their rear yard. For purposes of this case, they were the lords and ladies of the manor. Reasonable expectations of privacy have been found in places and items much less secure than the plaintiffs' backyard. *See, State v. Mooney*, 218 Conn. 85, 111 (1991)(homeless defendant had reasonable expectation of privacy in cardboard box and duffel bag stored under highway overpass that contained his belongings); *State v. Joyce*, 229 Conn. 10, 23 (1994)(defendant had reasonable expectation of privacy in clothing so damaged by fire it was essentially reduced to rags).

The defendants have offered absolutely nothing to negate the fact that the plaintiffs

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

exercised exclusive control over the rear of the subject property, that defendants observed nothing from a lawful vantage point to justify the entry, and that the defendants were, in fact trespassers, whose misconduct and incompetence caused a horrible tragedy. Indeed, despite the misleading and unsupported suggestions in their memorandum, the defendants could not see into the rear yard without trespassing.

The defendants also falsely suggest that the property was not enclosed by fences or gates, Defs.' Mem. at 7, and that there were no "No Trespassing" or equivalent signs on the property. *Id.*, at 8. However, the sworn affidavits, depositions, police reports, and other exhibits *conclusively* demonstrate the inaccuracy of these claims. The entire property was indeed enclosed by either fencing or the rear wall of a garage, including a gate across the front walkway, with the only gap existing across the driveway to allow vehicles to enter and exit. The fact that the front gate may have been open would certainly lead to the conclusion that a stranger could approach the front door. However, the defendants did not approach the front door, and had no intention of doing so. Furthermore, the plaintiff posted "Beware of Dog" signs on three sides of his house. The defendants observed at least one of them – certainly the functional equivalent of a "No Trespassing" sign. These facts clearly demonstrate the plaintiffs' intent to exclude uninvited intruders from their property. The defendants' memorandum is utterly devoid of any evidence to support a contrary finding. Thus, the back yard of the plaintiffs' home was undeniably curtilage and subject to the heightened Fourth Amendment protections traditionally given to dwelling places. As the plaintiffs have already argued that these facts entitle them affirmatively to summary judgment in their favor, the defendants assertions are utterly without merit. In any event, the undisputed facts certainly provide no basis to grant the defendants' motion.

The defendants proffer several cases which they claim support a conclusion that the yard

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

surrounding a home is not curtilage. None of these cases are similar to the facts in this case and, therefore, do not support the defendants' claims. In *United States v. Hayes*, 551 F.3d 138, 145-47 (2d. Cir. 2002) the court did not decide whether the unfenced yard in question constituted curtilage, since the police canine alerted to the presence of narcotics while lawfully on the front lawn, giving the canine's handler probable cause to search the rest of the yard. In the present case, the defendant officers had no legitimate reason for being on the property in the first place. In *Simko v. Town of Highlands*, 276 Fed. Appx. 39 (2d. Cir. 2008), the area searched obviously did not harbor the intimacies of private life and, therefore, was not considered curtilage. The officers in that case searched a shed in an unfenced rear yard which "was clearly a structure meant for dogs and not for intimate human activity, and the proximity of an overflowing 'poop pit' strongly suggests that the area surrounding the shed would be unattractive to private home activities." *Id.*, at 41. The plaintiffs here did use the yard for normal family activity: to cook, eat, entertain, and as a safe place where a child could play and care for the family pets.

The defendants also cite to *United States v. Reyes*, 283 F.3d 446 (2d Cir. 2002), in which the court found a search reasonable because police entered the property by walking up the driveway, which was the path any visitor would take. However, these defendants clearly deviated from the path a normal visitor would take by sneaking around the north side of the house, opposite the driveway, with their guns drawn. They do not claim they were walking towards the front door and in fact did not approach the door at all. While the defendants correctly cite *United States v. Williams*, 219 F. Supp. 2d 346 (W.D.N.Y. 2002), for the proposition that a driveway exposed to public view is not curtilage, the plaintiffs do not understand its relevance here since the defendants did not enter onto the driveway or use the front walk, nor did they observe any suspicious activity from those locations. Finally, both *United*

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

States v. Hogan, 122 F. Supp. 2d 358 (E.D.N.Y. 2000) and *State v. Hall*, 719 A.2d 435 (Vt 1998), cited by the defendants, involved situations where police officers established probable cause to search while lawfully in a position to observe the evidence.

Therefore, the defendants' argument that the yard surrounding the plaintiff's home was not curtilage and not subject to the protections of the Fourth Amendment is baseless. They cite to no evidence or case law that supports their bizarre interpretation of what constitutes protected property under the Fourth Amendment.

3. The Defendants' Entry into the Plaintiff's Yard was an Unreasonable Search in Violation of the Fourth Amendment.

The defendants do not address whether the entry into the plaintiffs' yard was otherwise justified under the Fourth Amendment, and instead choose to simply rely on their argument that the plaintiffs have no standing to complain due to the absence of an expectation of privacy in their back yard because it was not curtilage. As discussed in Sections 1 and 2 above, that argument fails. The plaintiffs refer to their own Aug. 10 Memorandum, Part IV.A, in support of their argument that the defendants' entry onto the plaintiffs' property was impermissible under the Fourth Amendment. The defendants' failure to address this issue provides sufficient grounds to rule against them.

Therefore, the defendants' motion for summary judgment on the plaintiffs' claims of illegal search under the Fourth Amendment must fail.

4. Because The Defendants' Entry into the Plaintiff's Yard was an Unreasonable Search in Violation of the Fourth Amendment, they are Liable for the Wrongful "Seizure" of the Family's Dog

The defendants essentially argue that killing the dog was justified because it was acting aggressively and O'Hare feared for his life. Although this fact is disputed, because the dog was

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

never aggressive, the argument is immaterial, because the defendant officers are liable for the shooting in any event since they had no right to be in the yard, which caused the dog to run after them. The plaintiffs refer to their argument in their Aug. 10 Memorandum, Part IV.A in support of their contention that the shooting of the dog was a natural and foreseeable consequence of the defendants' illegal entry onto the property. A "seizure" of property occurs "when there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Soldad v. Cook County*, 506 U.S. 56, 61 (1992). However, the plaintiffs claim that their St. Bernard was not an aggressive dog and, therefore, dispute the defendants' version of events which, in any event, is based upon subjective beliefs. See, *infra*.

5. There is a Genuine Issue of Material Fact as to Whether the Plaintiffs' Dog Posed an Imminent Threat to the Officers.

In response to the defendants' assertion that the dog posed a threat to them, the plaintiffs refer again to their Aug. 10 Memorandum, Section IV.B, for the law pertaining to police shootings of family pets. As noted in that memorandum, since the defendants were not legally on the property, they cannot justify their destructive actions as reasonable.

The defendants claim that the posture of the dog led O'Hare to believe that the St. Bernard was about to attack him. As noted earlier, such subjective beliefs are irrelevant for summary judgment analysis. If the law were otherwise, then an officer with an irrational fear of dogs could kill any canine he (or she) encountered in the course of his duty. However, the defendants' version of events are contradicted by the plaintiff's testimony that the dog was good-natured and obedient, and did not bite anyone. As noted in the plaintiff's Aug. 10 Memorandum, the defendants recognized that the dog was a St. Bernard, and not a pit bull or other "dangerous attack dog." This gives rise to a genuine issue of material fact as to whether the dog could have

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

been considered an imminent threat to O'Hare's safety. Since Defendant O'Hare has claimed a version of facts about why he entered the yard that is contradicted by every other witness, including fellow police officers, it is also reasonable for a jury to conclude that his testimony is untrustworthy and should be rejected in its entirety. In any event his version of events and his subjective thought processes cannot form the basis for a summary judgment ruling in his favor.

Even assuming *arguendo* that the first two shots could be considered reasonable based upon the defendants' version of the facts and O'Hare's irrational fear of the dog, the shot to the head is not reasonable. Under the plaintiffs' version of the facts, which must be adopted as true in considering the defendants' motion for summary judgment, O'Hare fired two shots which wounded the dog and caused him to fall to the ground. Then K.H. screamed "don't shoot my dog." O'Hare paused, looked at K.H., then back to the wounded dog, and shot it in the head at close range. This third and fatal shot was not necessary to protect O'Hare's life because the dog was wounded and lying on the ground, weakly wagging its tail. The necropsy report demonstrates to a degree of medical certainty that the shot to the brain killed the dog. Thus, the execution of the dog by O'Hare was completely unnecessary, and impermissible under the Fourth Amendment.

Therefore, a jury could easily find that the killing of the plaintiffs' dog constituted an unlawful seizure under the Fourth Amendment, precluding the defendants' motion.

6. The Defendant Officers are Not Entitled to Qualified Immunity For Their Entry Into the Property and the Killing of the Dog

Qualified immunity shields public officials from liability under 42 USC § 1983 when the right at issue is not clearly established and the defendants acted reasonably. *See, Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808 (2009); *Saucier v. Katz*, 533 U.S. 194 (2001); *Harlow v.*

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Fitzgerald, 457 U.S. 800 (1982). Its purpose is to protect public officials from harassing, distracting, baseless litigation while balancing the need to hold public officials accountable for their acts. *Pearson*, 129 S.Ct. at 815.

To determine whether qualified immunity applies, courts generally follow the process heretofore mandated by *Saucier v. Katz*: First decide whether the right at issue was violated by the government actor; then decide whether the right was clearly established. *Id.*, 533 U.S. at 201. The Supreme Court's recent decision in *Pearson v. Callahan*, *supra*, makes this process optional, while recognizing that the *Saucier* model remains beneficial because it can be difficult to determine whether a right is clearly established without first determining what the right happens to be. *Pearson*, 129 S.Ct. at 818.

A constitutional right is clearly established when "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing is wrong." *Anderson*, 483 U.S. at 640. In interpreting this standard, this Court has set forth three factors to assist in determining which rights are clearly established:

(1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991). Alternatively, a defendant may attempt to show that even if the rights in question were clearly established, the defendant was "objectively reasonable" in believing that his actions did not violate the plaintiffs' constitutional rights. *Soares v. State of Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993). The defendant is entitled to qualified immunity only "if the court determines that the only conclusion a rational jury could reach is that reasonable [governmental actors] would disagree about the legality of the defendants' conduct

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

under the circumstances [presented],” *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995).

However, a court properly reaches this determination only when the material facts are not in dispute. *Id.*

Here, the right at issue is very clear: the right to be free from warrantless searches and seizures, without probable cause, in the curtilage of one’s home, where the plaintiffs possessed a reasonable expectation of privacy. The right to be free from a warrantless intrusion into the home and without probable cause is set forth in the actual language of the Fourth Amendment. See, *Groh v. Ramirez, supra*. This right has been established since the original drafting of the Bill of Rights, and has its roots in English common law. See, e.g., *Johnson v. United States*, 333 U.S. 10, 14 (1948); *Payton v. New York*, 445 U.S. 573, 586, (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Kyllo v. United States*, 533 U.S. 27 (2001); *State v. Santiago*, 224 Conn. 494, 517, (1993)(Berdon, J., dissenting)(discussing historical background of the provision). Furthermore, it has long been established that the home and its curtilage are accorded especially high protection under the Fourth Amendment. See, *Johnson*, 333 U.S. at 14; *Payton*, 445 U.S. at 586; *Welsh*, 466 U.S. 740; *Kyllo*, 533 U.S. (2001); *Dunn*, 480 U.S. at 300. What constitutes curtilage and how to determine its contours is likewise settled, and is hardly subject to the kind of arguments that defendants seek to invent here. See, *Dunn*, 480 U.S. at 300; *United States v. Reilly*, 76 F.3d 1271, 1275-76 (2d Cir. 1996); *Brocuglio v. Proulx*, 478 F. Supp. 2d 297, 302-03 (D. Conn. 2007), *aff’d*, 2009 WL 1059896 (2d Cir. Apr 21, 2009); *Brocuglio*, 264 Conn. 778.

As the plaintiffs have already argued above and in their earlier memorandum, any reasonable police officer would know that the plaintiffs’ yard was curtilage, subject to the warrant requirement. First, it was surrounded by fences and a gate. The only gap in the fence was across the driveway. Second, three “Beware of Dog” signs were posted, one of which was clearly visible

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

from the street. Third, the rear yard was completely blocked from public view. Fourth, the defendants did not use the driveway or the front walkway, but rather skulked around the opposite side of the house towards the enclosed rear yard, with guns drawn. Fifth, the plaintiff used the rear of his yard for the type of activities typically associated with the intimate activities of home and family. Thus, the plaintiffs' yard, and particularly the rear yard, was clearly curtilage and subject to highest protection under the Fourth Amendment.

Thus, any reasonably competent officer would know, that entering the curtilage of a home without probable cause and without a warrant (or valid exception to the warrant requirement) with guns drawn, blatantly violated the Fourth Amendment. *See*, Part IV.A of the plaintiffs' Aug. 10th Memorandum. Indeed, under the plaintiffs' version of facts, the defendants had no reason – legitimate or otherwise – to enter the property, since O'Hare's subjective hope to interrupt a possible crime was contradicted by the tip that Laureano, himself, claims to have related to the defendants, but both versions must be rejected in this analysis because they are disputed by Mr. Hemingway himself, who told Laureano nothing about guns on Enfield Street. Under no Fourth Amendment analysis could such a warrantless entry possibly be considered reasonable or legal, and the defendants' qualified immunity analysis lacks even a contested factual basis for its support.

Finally, it was unreasonable for O'Hare to shoot the plaintiffs' dog for the reasons discussed above and in Part IV.B of the plaintiffs' Aug. 10th Memorandum. However, even if the initial shooting could possibly be determined to be reasonable under the plaintiffs' version of facts, the third shot to the dog's brain while it was lying on its side, which the plaintiffs characterize as an "execution," was not reasonable. At that point, the dog was helplessly lying on the ground; any subjective threat perceived by O'Hare had dissipated.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Therefore, the defendants are not entitled to qualified immunity and their motion for summary judgment must be denied.

C. THE FOURTEENTH AMENDMENT PROVIDES AN APPROPRIATE REMEDY AND THE ACTIONS OF THE OFFICERS HERE CLEARLY SHOCKED THE CONSCIENCE

1. The Plaintiffs' Version of the Facts Clearly Shows a Violation of the Plaintiffs' Substantive Due Process Rights

The defendants argue that the plaintiffs do not state a valid claim under the Fourteenth Amendment for the shooting and killing of their dog. Their argument fails to grasp the nature of the plaintiffs' case under the Fourteenth Amendment. The "seizure" of the dog for Fourth Amendment purposes occurred after O'Hare's first two shots. The plaintiffs do not allege a substantive due process claim for the first two shots, because they agree that a remedy for these actions is already provided under the Fourth Amendment. Rather, the plaintiffs claim that the murder of a child's pet with a point-blank shot to the brain of a helpless animal, in front of the child, is so despicable and outrageous that it separately violates the Fourteenth Amendment. At that point, shooting the dog a third time did nothing to add to the already unreasonable seizure. This, of course, requires acknowledgment of the plaintiffs' version of events, where there was a contemplative pause between the second and third bullet. The defendants clearly violate Rule 56 by ignoring plaintiff's version of events.

"[T]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). To prevail on a claim of violation of substantive due process, a plaintiff must prove that defendants' conduct shocks the conscience. See *Gargiul v. Tompkins*, 704 F.2d 661 (2d Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1016 (1984); *Reed v. Town of Branford*, 949 F. Supp. 87,

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

90-91 (D.Conn. 1996) (citing *Interport Pilots Agency v. Sammis*, 14 F.3d 133, 144 (2d Cir. 1994)). Government actions intended only to “oppress or to cause injury and serve no legitimate government purpose unquestionably shock the conscience. Such acts by their very nature offend our fundamental democratic notions of fair play, ordered liberty and human decency.” *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2nd Cir. 2001).

Here, the minor plaintiff testified that when she saw her pet lying wounded and helpless on the ground after being shot twice, she screamed “don’t shoot my dog.” O’Hare then looked at her, looked back at the dog, and shot the dog in the head, causing the dog’s death. The veterinarians’ necropsy report clearly concludes that it was this third shot that killed the dog. There was absolutely no government interest that could justify the brutal execution of a helpless family pet in front of a twelve year old girl. At that point, the dog was certainly not charging, growling, snapping, or exhibiting any other threatening behavior that the defendants allege. Thus O’Hare can not claim that he shot the dog a third time in self defense. Furthermore, O’Hare heard the young owner of the animal, who was clearly in distress at the time, issue a plea not to shoot her dog, which O’Hare ignored. Then, after the child ran to her dog weeping and fell upon the animal’s body, O’Hare had the temerity to turn to her and say “Sorry, miss, your dog isn’t going to make it.” This experience was so damaging to the minor plaintiff that she was hospitalized for suicidal ideation caused, at least in part, by witnessing this traumatic event.

Since the defendants deny the minor plaintiff’s version of events, the plaintiffs did not move for summary judgment on this count. More appalling, however, is that they fail to acknowledge the plaintiffs’ version, and rely on their own disputed facts alone. However, the minor plaintiff’s testimony, combined with the veterinary report and Glen Harris’ testimony about the dog’s disposition, lend substantial support to the plaintiffs’ version of the facts, which, if

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

accepted by a jury, would easily demonstrate a violation of the plaintiffs' substantive due process rights. Therefore, the defendants' motion for summary judgment on this count fails.

2. The Defendants are not Entitled to Qualified Immunity For Executing the Plaintiffs' Family Pet in Front of a Twelve Year Old Child.

The defendants next argue that they are entitled to qualified immunity because O'Hare could not reasonably have known that executing the family pet in front of its child owner as it was lying on its side was anything more than "insensitive." This was not "Old Yeller" who was shot as a mercy killing by a child's father because the dog had rabies. The defendants' argument is, in and of itself, galling. O'Hare's despicable conduct as outlined above is so beyond the pale of decent and acceptable behavior that it would have been clear to any officer, not just the defendants, that the execution of a wounded pet in front of its minor owner would shock the conscience and result in a collective cry of "outrageous" from any jury. Therefore, the defendants are not entitled to qualified immunity on this claim.

D. SINCE THE DEATH OF THE DOG WAS A NATURAL AND FORESEEABLE CONSEQUENCE OF THE OFFICERS' ILLEGAL ENTRY INTO THE CURTILAGE OF THE PLAINTIFFS' PROPERTY, PIA HAD AMPLE OPPORTUNITY TO INTERVENE AND SHOULD HAVE KNOWN THAT THE ENTRY ONTO THE PROPERTY VIOLATED THE PLAINTIFF'S CLEARLY ESTABLISHED RIGHTS

The defendants claim that the Pia did not have a realistic opportunity to intervene before the shooting of the dog. The plaintiffs again rely on their original memorandum, Part IV.A.3, that the shooting of the plaintiffs' pet was a natural and foreseeable consequence of the defendants' illegal warrantless entry onto plaintiffs' property. Furthermore, as argued in Part IV.A.2 of the Aug. 10th Memorandum and in Part III, *supra*, of this Memorandum, the warrantless entry onto the property so obviously violated the Fourth Amendment that any reasonable officer should have known that the entry was illegal. Therefore, Pia not only had a duty not to perpetrate an

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

unreasonable search, but as a sworn officer, he had a duty to stop O'Hare's illegal entry, as well. Instead, he joined an unlawful frolic that led directly to the killing of the plaintiffs' dog. Pia could have intervened at any point between the time when the defendants first decided to trespass on the plaintiffs' property with guns drawn, and the time when they reached the rear yard and were spotted by the dog. Furthermore, plaintiffs' evidence demonstrates that O'Hare paused before the third fatal shot to the dog's head, yet Pia did nothing to stop O'Hare's misconduct. Therefore, any claim that Pia had no reasonable opportunity to intervene is without merit and this separate argument for summary judgment must fail.

E. THE PLAINTIFFS' CONNECTICUT CONSTITUTIONAL CLAIM IS EXPLICITLY AUTHORIZED UNDER THE CONNECTICUT SUPREME COURT DECISION IN *BINETTE V. SABO*.

The defendants' argument that the Connecticut Supreme Court decision in *Binette v. Sabo*, 244 Conn. 23 (1998) precludes the plaintiffs' action for money damages under the Connecticut Constitution is curious, at best, since the very holding of that case is to contrary to their position. The plaintiffs in *Binette* sued members of the Torrington police department for warrantless entry into their home and for the use of excessive force. Relying primarily on *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Connecticut Supreme Court acknowledged a direct action for money damages against the officers stemming from violations of §§ 7 and 9 of Article First of the Connecticut Constitution. In so holding, the Court reasoned:

The difference in the nature of the harm arising from a beating administered by a police officer or from an officer's unconstitutional invasion of a person's home, on the one hand, and an assault or trespass committed against one private citizen by another, on the other hand, stems from the fundamental difference in the nature of the two sets of relationships . . . A police officer's legal obligation . . . extends far beyond that of his or her fellow citizens: the officer not only is required to respect

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

the rights of other citizens, but is sworn to protect and defend those rights Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen's rights but affirmatively violates those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen We are persuaded, therefore, that the compelling policy considerations favoring the creation of a constitutional tort in *Bivens* apply with equal force to this case.

Binette, 244 Conn. at 43-45. This language expressly applies to the plaintiffs' constitutional claims. Furthermore, "there is no requirement that all factual allegations supporting unreasonable search and seizure claims under the Connecticut Constitution must correspond exactly to the facts in *Binette*." *Milardo v. City of Middletown*, 2009 WL 801614, *7 (D. Conn., Mar 25, 2009, Squatrito, J.)(attached). Several other courts in this district have similarly found that a cause for monetary damages exists when police officers enter private homes without a warrant in violation of the state Constitution. *Id.*, (gathering cases).

The plaintiffs, therefore, clearly possess a cause of action for monetary damages for the defendants' violations of §§ 7 and 9 of Article First of the Connecticut Constitution pursuant to the decision in *Binette v. Sabo*. Furthermore, the defendants' actions were unjustified, as argued above and in the plaintiffs' Aug. 10th Memorandum.

F. THE OFFICERS' EXTREME AND OUTRAGEOUS ACTIONS IN KILLING THE PLAINTIFFS' DOG IN FRONT OF A CHILD FORM THE BASIS OF A VALID CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To succeed on a claim for intentional infliction of emotional distress, a plaintiff must establish four elements: "(1) that the actor intended to inflict emotional distress, or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendants' conduct was the cause of the

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe.” *Petyan v. Ellis*, 200 Conn. 243 (1986). The conduct must cause and be calculated to cause serious mental distress. *DeLaurentis v. New Haven*, 220 Conn. 225 (1991). Whether defendants' actions arise to the level of 'extreme and outrageous' is a question of fact for the jury when reasonable minds can differ on its outcome. *Appleton v. Board of Education*, 254 Conn. 205, 210-11 (2000). Generally, the test to determine whether conduct is extreme and outrageous “is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” *Id.*

The argument that defendant O'Hare's conduct intentionally inflicted emotional distress under the Connecticut common law closely parallels the argument in Part III.C. above under Fourteenth Amendment substantive due process because the elements appear to be similar. To deliberately execute a helpless pet in the presence of its young owner is so far outside the bounds of acceptable behavior as to be outrageous. The plaintiffs suggest that any reasonable jury, faced with this set of facts, would find that O'Hare's despicable conduct was extreme and calculated to cause severe mental distress, which, in fact, did occur. Courts have denied summary judgment on intentional infliction of emotional distress claims for much less egregious behavior: *see, Stack v. Perez*, 248 F. Supp.2d 106 (D. Conn., 2003)(intentional infliction of emotional distress found when female police officer threatened to use her connections with Hartford Police Department to cause the plaintiff, her ex-lover, physical harm); *Murphy v. Lord Thompson Manor*, 105 Conn. App. 546 (2008)(not clearly erroneous that cancelling a contract for the performance of wedding related services after two years of planning was outrageous conduct); *Benton v. Simpson*, 78 Conn. App. 746 (2003)(probable cause for intentional infliction of emotional distress when defendant supervisor made disparaging and threatening remarks to female plaintiff employees).

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Therefore, the defendants' motion for summary judgment as to plaintiffs' intentional infliction of emotional distress claim must fail.

G. THE OFFICERS' WARRANTLESS ENTRY WAS UNLAWFUL, MAKING THEM TRESPASSERS, NOT LICENSEES

The defendants claim that they were acting in the performance of their official duties when they entered the plaintiffs' property and therefore must be considered licensees and not trespassers. The plaintiffs incorporate by the argument in their Aug. 10th Memorandum, Part IV.D, as well as the Fourth Amendment analyses in both this memorandum and in the earlier document. The defendants' claim that they were licensees is utterly without merit, because they fail to explain what they think they were licensed to do at the time they entered and remained on the property. Because the defendants were not acting in the course of their official duties, lacked a warrant, and certainly lacked probable cause, they were trespassers. Whether or not the court grants the plaintiffs' motion for summary judgment, the defendants' claim must be denied.

H. THE KILLING OF THE DOG WAS NOT JUSTIFIED AND THE OFFICERS EXERCISED UNAUTHORIZED DOMINION OVER THE PLAINTIFFS' PROPERTY, THEREBY COMMITTING THE TORT OF CONVERSION.

The defendants also claim that they were justified in exercising dominion over the dog by shooting it because it posed an imminent threat to O'Hare. The plaintiffs incorporate by reference the respective argument in their Aug. 10th Memorandum Part IV.E, and to the Fourth Amendment analyses contained in this memorandum and the original memorandum in opposition. Because the plaintiffs can demonstrate to a jury a set of facts proving that the defendants exercised unauthorized and unjustified dominion over the dog, they remain liable for conversion, and are not entitled to summary judgment.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

I. THE DEFENDANTS ARE NOT ENTITLED TO GOVERNMENT IMMUNITY ON THE PLAINTIFFS' NEGLIGENCE CLAIM

While it is true that municipal officers are generally shielded from liability for negligence for their discretionary acts under Conn. Gen. Stat § 52-557n, and that the defendants in this case were engaged in discretionary acts, *see, Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 180 (1988), there are three exceptions to this rule:

First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness, or intent to injure . . . Second, liability may be imposed when a statute provides for a cause of action against a municipality of municipal official for failure to enforce certain laws . . . Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.

Violano v. Fernandez, 280 Conn. 310, 319-20 (2006). Of these three exceptions, the first and the third exception apply to the plaintiffs' case.

1. Officer O'Hare acted with Malice, Wantonness, and Intent to Injure when He Executed the Family Pet in Front of the Minor Plaintiff

The plaintiffs assert that the defendants entered the rear yard of their home, without a warrant, based on some unreliable information from an unknown source that there might be evidence of some wrongdoing on the property. The defendants' actions must be more than mere negligence. *Fleming v. City of Bridgeport*, 284 Conn. 502, 535-36 (2007); *Mulligan v. Rioux*, 229 Conn. 716, 732 (1994)(finding that malicious prosecution, by definition, was sufficiently malicious to defeat municipal immunity). The plaintiffs have previously set forth evidence that demonstrates that the defendants violated their Fourth Amendment rights, and that they were wanton in doing so. Under the qualified immunity analysis above, which is not the same thing as governmental immunity under state law, the defendants' actions were so far beyond what a

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

reasonable officer would have understood search and seizure law to permit so as to rise far above the level of negligence. The defendants acted in clear disregard of the fourth amendment and the Connecticut Constitution when they entered the side and rear yard of the plaintiffs' home. If the defendants seek to argue that the shooting of the dog was somehow an accident, then a jury could conclude that it was the direct consequence of the wanton misconduct. Therefore, the defendants are not entitled to immunity under the first exception to the statute.

2. The Defendant Subjected the Minor Plaintiff to Imminent Harm

Alternatively, any claim of municipal immunity must fail because the identifiable person-imminent harm exception applies. The defendants absurdly argue that the minor plaintiff was not an identifiable victim, and that she was not subject to imminent harm. This argument is utterly without merit.

In order for the harm to be imminent such that it would be apparent to a public officer, the harm must be sufficiently limited in time and geography to make it foreseeable. *See, Burns*, 228 Conn 640, 647 (1994). Harmful actions that may occur "anytime or not at all," such as a potential fire in a dwelling, *see, Evon v. Andrews*, 211 Conn. 501 (1989), or the possibility of sexual assault by truant students, *see, Doe v. New Haven Bd. of Educ.*, 76 Conn. App. 296 (2003), do not satisfy this requirement. The geographic and time limitations need not be narrowly defined. For example, in *Colon v. City of New Haven*, 225 Conn 908 (2000), the court found the school could be found liable when a school official negligently opened a door so that it injured a student standing behind it, because the potential for harm was limited to school hallways at passing time. *See also, Burns v. Bd. of Ed. Of City of Stamford*, 228 Conn 640 (1994)(harm posed by temporarily icy sidewalk foreseeable). "Notably, the third part of the test refers to an

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

official's 'conduct' and does not specify that the officer must have failed to act." *Belanger v. City of Hartford*, 578 F. Supp.2d 360, 367 (D. Conn., 2008)(Police officer not entitled to statutory immunity for hitting the plaintiff across the face with a baton). Finally, the potential for harm must be significant and foreseeable. *Purzycki v. Town of Fairfield*, 244 Conn. 101, 110 (1998). Here, the time and place were clearly limited to the warrantless entry of the plaintiffs' yard on December 20, 2006 a short time after 3:00 p.m.

Moreover, clearly the residents of 297 Enfield Street were readily identifiable victims due to the entry, and K.H. was actually identified by O'Hare before the deadly gunshot to the brain because she yelled at O'Hare, "don't shoot my dog." O'Hare then turned and looked at her before going ahead and killing the dog anyway. At this point, O'Hare knew K.H. was present, could see that her dog was wounded, and knew she did not want her dog to be injured further. Thus, K.H. was more like the plaintiff in *Belanger v. City of Hartford*, whom the defendant police officer hit across the face with a baton, than the throngs of students who were nevertheless deemed identifiable victims in *Purzycki v. Town of Fairfield*.

O'Hare knew or should have known that killing the dog in front of a child could cause her emotional distress, and that the dog no longer posed any harm to him, even if O'Hare at an earlier point believed that it did. Nevertheless, O'Hare turned back to the wounded animal and killed it. Pia, despite the pause before the fatal shot, did nothing to stop O'Hare from firing his gun a third time. Therefore, the identifiable victim-imminent harm exception applies and the defendants are not entitled to statutory immunity under the third exception.

J. THE DEFENDANTS WERE RECKLESS DURING THEIR UNREASONABLE ENTRY.

The plaintiff agrees with the law of recklessness as set forth in the defendants'

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

memorandum, which quotes extensively from *Craig v. Driscoll*, 262 Conn. 312.(2003). However, the defendants cannot seriously argue that their conduct does not constitute recklessness.

Contrary to the law governing reasonable searches and seizures, they entered the plaintiffs' property without a warrant, without probable cause, and without justification. The plaintiffs possessed a reasonable expectation of privacy in their yard. The defendants failed to seek any evidence to corroborate the anonymous "tip" about guns that they claim they received from Laureano, and they failed to obtain a warrant before entering this purely private residential property. Thus, the defendants were reckless in entering onto the property in the first place, and are liable for the natural consequences of their acts.

O'Hare was also reckless in killing the plaintiffs' dog and Pia was reckless for failing to stop him. They acted recklessly by trespassing despite fences and "Beware of Dog" signs. The dog posed no harm to O'Hare at the time he killed it, and his act constituted an extreme departure from the standard of ordinary care. Pia was reckless in simply running away and failing to stop O'Hare when he turned around and saw what he intended to do. Therefore, the defendants were both reckless, and not entitled to summary judgment on this count.

K. THE CITY OF HARTFORD IS LIABLE TO THE PLAINTIFF UNDER A THEORY OF INDEMNIFICATION FOR THE ACTS OF DEFENDANTS O'HARE AND PIA.

Pursuant to Connecticut General Statutes §§ 1-101a and 7-465 the City of Hartford is required to pay, on behalf of its employees, damages arising from the negligent or willful and wanton acts, and for violations of the plaintiff's constitutional rights. Both statutes require notice to the municipality. Here, the plaintiff mailed a Notice of Intent to Sue to the Town Clerk of the City of Hartford on or about April 9, 2007, and the Town Clerk received the Notice of Intent to

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Sue on or about April 10, 2007. Ex. SJ-17. Therefore, assuming O'Hare and Pia are liable to the plaintiffs on any theory contained in the complaint, the City of Hartford is liable to pay the plaintiffs for any resulting damages. Therefore, the City's separate motion for summary judgment must be rejected.

III. CONCLUSION

For the foregoing reasons, as well as for those reasons set forth in plaintiffs' own memorandum in support of summary judgment, the defendants' motion should be denied.

THE PLAINTIFF—
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
Fed Bar #ct00119
(860) 278-3500
Fax: (860) 278-6393
Email: Civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Summary Judgment\Opposition to Defs SJ\OppSJ-Memo.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

Slip Copy
Slip Copy, 2009 WL 801614 (D.Conn.)
(Cite as: **2009 WL 801614 (D.Conn.)**)

Page 1

Only the Westlaw citation is currently available.

United States District Court,
D. Connecticut.
Sebastian J. MILARDO, Nella Milardo, Angelo
Milardo, Gino Milardo, and Enza
Milardo, Plaintiffs,
v.
CITY OF MIDDLETOWN, J. Edward Brymer, Of-
ficer Frank Scirpo, and Officer Janie
Seixas, Defendants.
No. 3:06CV01071(DJS).

March 25, 2009.

David K. Jaffe, Sally A. Roberts, Brown, Paindiris
& Scott, Hartford, CT, for Plaintiffs.

Alan Raymond Dembiczak, Beatrice S. Jordan,
Thomas R. Gerarde, Howd & Ludorf, Hartford, CT,
Timothy P. Lynch, City Attorneys Office,
Middletown, CT, Mark V. Connolly, Law Offices
of Mark V. Connolly, Avon, CT, for Defendants.

MEMORANDUM OF DECISION AND ORDER
DOMINIC J. SQUATRITO, District Judge.

***1** The plaintiffs, Sebastian J. Milardo ("Sebastian"), Nella Milardo ("Nella"), Angelo Milardo ("Angelo"), Gino Milardo ("Gino") and Enza Milardo ("Enza") (collectively, "the Plaintiffs") bring this action against the defendants, the City of Middletown ("the City"), J. Edward Brymer ("Brymer"), Officer Frank Scirpo ("Scirpo"), and Officer Janie Seixas ("Seixas") alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution and Article I § 7 of the Connecticut Constitution. The Plaintiffs also allege common-law trespass, negligent and intentional infliction of emotional distress, and maintain that the City must indemnify the individual defendants. The defendants have filed motions for summary judgment pursuant to Rule 56 of the Federal Rules of

Civil Procedure. For the reasons that hereafter follow, the motion for summary judgment by the City, Scirpo, and Seixas (**dkt.# 47**) is **GRANTED in part and DENIED in part**, and the motion for summary judgment by Brymer (**dkt.# 48**) is **GRANTED**.

I. FACTS

The City is a municipality located in Connecticut. At all times relevant to this case, the individual defendants were members of the City's Police Department. Scirpo and Seixas were police officers for the City, and Brymer was the Chief of Police.

In the early evening of May 9, 2004, the City's Police Department received a report from a person named Christopher Welch ("Welch"), who accused Angelo of stealing a pair of red and white sneakers, a pair of work boots, and \$60.00 from Welch's residence in the City. The defendants claim that Seixas ran Angelo's name through the Police Department's computer, and the DMV files listed 241 Nejako Drive, Middletown, Connecticut as his address. Scirpo and Seixas then went to 241 Nejako Drive ("the Residence") in order to speak with Angelo.

Upon arriving at the Residence, Scirpo and Seixas knocked on the door. Nella, who was Angelo's mother, answered the door. Scirpo advised Nella that he and Seixas needed to speak with Angelo. Nella then went inside the Residence and informed Angelo that two police officers were outside looking for him.

Angelo exited the Residence via a breezeway located to the immediate left of the Residence's garage and spoke with Scirpo and Seixas in the driveway. The defendants claim that Scirpo advised Angelo that Welch had made a complaint against him, and that they asked Angelo whether they could search the Residence. Angelo informed Scirpo and Seixas that the Residence was not his, and that they would

need permission from his father, Sebastian, who had been a police officer for the City, and at the time of this incident, was a State Marshal.

Angelo proceeded back into the Residence via the breezeway, going into the kitchen. There is some ambiguity as to where Scirpo and Seixas were located at this time. Angelo testified that Scirpo and Seixas followed him into the kitchen, whereas Sebastian testified that Scirpo and Seixas were standing at the door entranceway from the breezeway to the kitchen. Angelo then went into the adjoining living room to speak with Sebastian. Angelo told Sebastian that there were police officers in the kitchen who wanted the search the Residence.

*2 Sebastian then walked over to Scirpo and Seixas and told them that if they did not have a search warrant, he wanted them to leave the Residence. Despite Sebastian's directive, Scirpo brushed by Sebastian, proceeded to walk into the living room, and went up the stairs where the bedrooms were located. Seixas followed Scirpo into the living room and proceeded to go up the stairs, but stopped on the stairs because Sebastian began speaking to her. Sebastian apparently told Seixas that what she and Scirpo were doing was wrong. The defendants claim that Seixas replied to Sebastian by stating that she and Scirpo had Angelo's permission to enter the Residence. Sebastian told Seixas that Angelo did not live at the Residence.

Seixas remained on the stairs until Scirpo came back downstairs. Scirpo had searched two of the upstairs bedrooms. These were the bedrooms of Gino, Angelo's younger brother, and Enza, Angelo's younger sister. Scirpo also searched a closet at the bottom of the stairs. After Scirpo had come downstairs, both he and Seixas went into the kitchen. Scirpo then proceeded down to the basement, where he conducted another search. At the time, Angelo, who resided elsewhere, was temporarily staying in the basement, where he slept on a futon. [FN1] Scirpo also searched the Residence's garage while

proceeding through the breezeway.

FN1. It appears that Angelo had been permanently residing at his aunt's house, to which he returned after spending four nights at the Residence.

Scirpo and Seixas then exited the Residence. Angelo, who also exited the Residence, gave a written statement to them. Scirpo and Seixas subsequently left the scene.

II. DISCUSSION

The defendants now move for summary judgment, arguing that: (1) the doctrine of qualified immunity bars any Fourth Amendment claim against Seixas and Brymer; (2) the 42 U.S.C. § 1983 claims against the City and Brymer in his official capacity fail as a matter of law; (3) the common-law trespass claim is barred as a matter of law; (4) the claim under the Connecticut Constitution fail as a matter of law; (5) the doctrine of governmental immunity bars any claim of negligence against the City; (6) the doctrine of governmental immunity bars the negligent infliction of emotional distress claim against Scirpo and Seixas; (7) the intentional infliction of emotional distress claim fails as a matter of law; and (8) the claim for indemnification directed to the City for the negligent acts of its employees fails as a matter of law. The Plaintiffs refute most of these arguments. The Court shall discuss the parties' arguments seriatim. [FN2]

FN2. The defendants argue that the Plaintiffs' claim pursuant to the Fourteenth Amendment fails as a matter of law because this claim is properly covered by the Fourth Amendment. The Court agrees with the defendants that the Fourth Amendment, not the Fourteenth, covers the unlawful search claim here. That being said, the Court did not read the complaint as necessarily alleging a separate cause of action under the Fourteenth Amendment (e.g.,

substantive or procedural due process claims). It is well established that "[t]he Fourth Amendment's search and seizure provisions are applicable to [state] defendants through the Fourteenth Amendment's Due Process Clause." *Tenenbaum v. Williams*, 193 F.3d 581, 602 n. 14 (2d Cir.1999) (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). Therefore, the Court read the complaint as alleging a Fourth Amendment claim that is applicable to the defendants through the Fourteenth Amendment, not any Fourteenth Amendment claim that is separate from the Fourth Amendment. Any such separate Fourteenth Amendment claims would, as the defendants argue, fail; however the Court does not believe there are such claims here.

A. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.' " *Am. Int'l Group, Inc. v. London Am. Int'l Corp.*, 664 F.2d 348, 351 (2d Cir.1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir.1975)).

*3 A dispute concerning a material fact is genuine "if evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.1992) (quoting *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 248 (1986)). The Court must view all inferences and ambiguities in a light most favorable to the nonmoving party. See *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Id.*

B. CLAIMS AGAINST BRYMER

Brymer filed his own motion for summary judgment, separate from the other defendants, arguing that all the claims against him in his official and individual capacity fail as a matter of law, and that the claims against him in his individual capacity are barred by the doctrine of qualified immunity. The Plaintiffs never filed an opposition to this motion. Indeed, even after Brymer filed a "reply memorandum" on November 10, 2008 to point out that the Plaintiffs had not filed an opposition to his arguments, the Plaintiffs never responded. In fact, on December 5, 2008, the Plaintiffs filed a surreply brief that did not address Brymer's motion or reply memorandum in any way. "Federal courts may deem a claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the argument in any way." *Coltin v. Corp. for Justice Mgmt., Inc.*, 542 F.Supp.2d 197, 206 (D.Conn.2008) (internal quotation marks omitted). It is clear that the Plaintiffs do not intend to pursue their claims against Brymer. Therefore, Brymer's motion for summary judgment is granted.

C. QUALIFIED IMMUNITY

The Court notes that, in their motion, the City, Scirpo, and Seixas [FN3] do not move for summary judgment on the Fourth Amendment claim against Scirpo, nor do they argue that Scirpo is entitled to qualified immunity. Thus, even if the Court were to grant summary judgment on all the bases set forth in the motion, the Fourth Amendment allegations against Scirpo would proceed, and the request that summary judgment be granted on the entirety of the complaint obviously must be denied. In addition, the Court points out that, with regard to Seixas' al-

leged violations of the Fourth Amendment, the Defendants argue only that she is entitled to qualified immunity, and, in the Defendants' qualified immunity discussion, they argue only that her conduct was objectively reasonable.

FN3. Because all of the claims against Brymer, who filed a separate summary judgment motion, have been dismissed, hereinafter, the Court shall collectively refer to the remaining defendants (namely, the City, Scirpo, and Seixas) as "the Defendants."

"[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Supreme Court established the analysis for determining whether an officer is entitled to qualified immunity. See *Saucier v. Katz*, 533 U.S. 194 (2001). "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. "[The next, sequential step is to ask whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. As the Second Circuit has held, "[w]hen a motion for summary judgment is made in the context of a qualified immunity defense, the question of whether the factual disputes are material is even more critical." *Cartier v. Lussier*, 955 F.2d 841, 845 (2d Cir.1992).

*4 The Fourth Amendment to the United States

Constitution reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. As noted above, the Fourth Amendment's search and seizure provisions are applicable to the state via the Fourteenth Amendment. See *Tenenbaum*, 193 F.3d at 602 n. 14. It is well established that "[w]arrantless searches 'are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions.'" *United States v. Howard*, 489 F.3d 484, 492 (2d Cir.2007) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)).

There is no dispute that Scirpo and Seixas did not have a warrant to search the Residence. Moreover, there is substantial evidence in this case that: (1) Angelo informed Scirpo and Seixas that the Residence was not his house; (2) Angelo informed Scirpo and Seixas that they would need permission from his father, Sebastian, to search the Residence; (3) Sebastian, the owner of the Residence, explicitly told Scirpo and Seixas that he did not consent to a search of the Residence; and (4) Sebastian expressly told Scirpo and Seixas to depart if they did not have a warrant. Nonetheless, Scirpo and Seixas proceeded into the Residence, wherein Scirpo went upstairs to search two bedrooms, and Seixas went up a portion of the stairway before stopping to talk with Sebastian. [FN4]

FN4. The Court acknowledges that the Defendants do not admit to this version of the facts. This version, however, is based on the evidence (mostly in the form of deposition testimony) from the Plaintiffs, who are the nonmovants here. For the purposes of summary judgment, the Court must accept their version of the facts over the De-

fendants' version, and resolve any factual ambiguities in favor of the Plaintiffs.

The Defendants argue that it was objectively reasonable for Seixas to believe that she was not violating the Fourth Amendment, and that reasonable officers could disagree on the legality of her actions. The Court rejects this argument. The above-mentioned facts, if believed by a jury, present no ambiguities. Scirpo and Seixas had no search warrant. Angelo informed them that they needed Sebastian's permission to conduct a search. [FN5] Sebastian did not consent to a search. There were no exigent circumstances requiring a search. Yet, Scirpo and Seixas continued to move about the house. Any reasonable police officer should know that such conduct, in and of itself, is a violation of the Fourth Amendment.

FN5. The Defendants allege that Angelo consented to a search of his bedroom. This is refuted by the Plaintiffs' evidence, which the Court must credit. Moreover, even if Angelo had given such permission, Sebastian expressly objected to any search of the Residence. The Supreme Court has held that when law enforcement officers conduct a search, authorized by one co-occupant, over the express objection of another co-occupant, any further search would be unreasonable as to the objecting co-occupant. *See Georgia v. Randolph*, 547 U.S. 103, 122-23 (2006). Thus, even if Angelo could authorize a search of his bedroom, Sebastian's objection would make unreasonable any search of the Residence other than Angelo's bedroom. There is evidence in the record that more than one room was searched. In addition, there is evidence that Angelo specifically told Scirpo and Seixas that Sebastian's permission was required to conduct a search. This fact would negate the argument that Angelo had any apparent authority to consent

to a search of the Residence.

Seixas argues that because Scirpo, not she, conducted the searches of the various rooms, a reasonable officer could disagree on the legality of her actions, which, according to her, consisted of discussing her presence in the Residence with Sebastian. This argument lacks merit. "A police officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in h[er] presence by other officers." *Ricciuti v. N.Y. City Transit Auth.*, 124 F.3d 123, 129 (2d Cir.1997) (internal quotation marks omitted). "[T]he failure to intercede must be under circumstances making it objectively unreasonable for h[er] to believe that h[er] fellow officers' conduct did not violate [the plaintiff's clearly established constitutional] right rights." *Id.*

*5 Given the facts here, a reasonable officer in Scirpo's place should have known that his actions violated the Fourth Amendment, and a reasonable officer in Seixas' place should have known that Scirpo's actions violated the Fourth Amendment. Or, put another way, it was objectively unreasonable for Seixas to believe that Scirpo's conduct did not violate the Fourth Amendment. As such, Seixas had a duty to intercede, yet she failed to do so. This means she too can be found liable under the Fourth Amendment. Seixas is not entitled to qualified immunity. Consequently, with regard to the Plaintiffs' Fourth Amendment claim, the Defendants' motion for summary judgment is denied.

D. MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983

The federal constitutional claim alleged in this case is brought pursuant to 42 U.S.C. § 1983. Title 42, Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979)). "To prevail on a § 1983 claim, a plaintiff must establish that a person acting under color of state law deprived him of a federal right." *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir.1999). The Plaintiffs maintain that, in addition to Scirpo and Seixas, the City should be held liable under § 1983.

"[M]unicipalities [are] liable under § 1983 to be sued as 'persons' within the meaning of that statute, when the alleged unlawful action implemented or was executed pursuant to a governmental policy or custom." *Reynolds v. Giuliani*, 506 F.3d 183, 190 (2d Cir.2007) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691, 694 (1978)). "In order to prevail on a claim against a municipality under section 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy [or custom] of the municipality caused the constitutional injury." *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir.2008) (citing *Monell*, 436 U.S. at 690-91). "The fifth element--the 'official policy' element--can only be satisfied where a plaintiff proves that a 'municipal policy of some nature caused a constitutional tort.' " *Id.* (quoting *Monell*, 436 U.S. at 691). "[A] municipality may not be found liable simply because one of its employees committed a tort [and] a municipality cannot be made liable under § 1983 for acts of its employees by application of the doctrine of respondeat superior." *Id.* (internal citation and quotation marks omitted).

*6 The Plaintiffs' contention here is that the City failed to properly train officers on proper search and seizure procedures. "The failure to train ... city employees may constitute an official policy or custom if the failure amounts to 'deliberate indifference' to the rights of those with whom the city employees interact." *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir.2007). To establish "deliberate indifference, a plaintiff must show that:

[i] a policymaker knows to a moral certainty that city employees will confront a particular situation; [ii] the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or there is a history of employees mishandling the situation; and [3] the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

Id. at 195-96 (internal quotation marks omitted). "[A] policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events." *Id.* at 196 (internal quotation marks omitted). "[W]here ... a city has a training program, a plaintiff must--in addition-- identify a specific deficiency in the city's training program and establish that th[e] deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation." *Id.* (internal quotation marks omitted).

The Plaintiffs have not met their burden for the failure to train claim. There is no question that the search of private residences is relatively common. Nonetheless, the Plaintiffs do not point to a specific deficiency in the City's training program that caused their injuries. The Plaintiffs draw the Court's attention to portions of Scirpo's and Seixas' deposition testimony to support their arguments here. This testimony, however, does not support a conclusion that the City did not train its officers on proper search and seizure procedures. In fact, from what the Court can discern, the City's search and seizure procedures, as described by Scirpo and

Seixas, were legally sound. Scirpo's and Seixas' implementation of those procedures might not have been sound. Their failure to follow the procedures in which they were trained, though, does not mean that the City failed to train them properly. Therefore, the City is not liable under § 1983. Consequently, with regard to any § 1983 claim against the City, the Defendants' motion for summary judgment is granted.

E. THE CONNECTICUT CONSTITUTION

The Defendants next argue that any claim under Article I § 7 of the Connecticut Constitution fails as a matter of law because no viable cause of action exists under that provision of the Connecticut Constitution based on the facts of this case. The Court notes that, based on its analyses above, this claim under the Connecticut Constitution, if viable, would be against only Scirpo and Seixas, and not the City or Brymer.

*7 There is little need for an extensive discussion on this issue. In *Binette v. Sabo*, 244 Conn. 23 (1998), the Connecticut Supreme Court held that a private right of action for money damages existed stemming from alleged violations of the search and seizure (§ 7) and false arrest (§ 9) sections of the Connecticut Constitution. *Id.* at 25-26. As Judge Arterton has noted,

[w]hile *Binette* emphasized that its decision did 'not mean that a constitutional cause of action exists for every violation of [Connecticut's] state constitution' and that '[w]hether to recognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis,' *Binette* did not ... impose a limitation on claims based on claimed police search and seizure violation of § 7.

Yorzinski v. Alves, 477 F.Supp.2d 461, 470-71 (D.Conn.2007) (quoting *Binette*, 244 Conn. at 47-48).

A number of judges within this District have found

that *Binette* creates a cause of action for money damages under Article I § 7 of the Connecticut Constitution for illegal police searches and seizures of private homes, and that this cause of action is equivalent to an action under the Fourth Amendment against federal officers pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). See *Carey v. Maloney*, 480 F.Supp.2d 548, 561 (D.Conn.2007) (Judge Droney); *Yorzinski*, 477 F.Supp.2d at 470-71 (Judge Arterton); *Bloom v. Town of Stratford*, Civil No. 3:05cv217 (PCD), 2006 WL 3388396, at *7 n. 12 (D.Conn. Nov. 16, 2006) (Judge Dorsey); *Lopez v. Smiley*, 375 F.Supp.2d 19, 23 (D.Conn.2005) (Judge Kravitz); *Tyson v. Willauer*, 290 F.Supp.2d 278, 286 (D.Conn.2003) (Judge Goettel) *Gillespie v. Ancona*, No. 3:97cv2045 (EBB), 1999 WL 66538, at *3-4 (D.Conn. Feb. 4, 1999) (Judge Burns). Contrary to what the Defendants argue, there is no requirement that all factual allegations supporting unreasonable search and seizure claims under the Connecticut Constitution must correspond exactly to the facts in *Binette*. As a result, the Court finds that the Plaintiffs' unreasonable search claim under the Connecticut Constitution survives to the same extent that the unreasonable search claim under the Fourth Amendment survives. See *Birdsall v. City of Hartford*, 249 F.Supp.2d 163, 171-72 (D.Conn.2003). [FN6]

FN6. The Court need not discuss whether a theory of municipal liability is available for violations of the Connecticut Constitution. The *Monell* claim against the City failed, which means that any such claim under the Connecticut Constitution would also fail.

F. TRESPASS

Under Connecticut common law, "[t]he essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting

the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury." *City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 87 (2007) (internal quotation marks omitted). The Defendants argue that because Scirpo and Seixas were exercising their official duties when they entered the Residence, they cannot be found liable for common-law trespass.

*8 The Court is not persuaded by this argument. The Court does not believe that Scirpo and Seixas would be liable for trespass up to the point when they first spoke with Sebastian. Nevertheless, after Sebastian told them that he wanted them to leave his property, they had to do so. Under the Plaintiffs' version of the facts, Scirpo and Seixas did not have a search warrant for the Residence, nor did they have written or oral consent to search the Residence. Absent either a warrant or consent, they would have had no right to be in the Residence at all, let alone the right to exercise a duty to search the Residence. This means, then, that once Scirpo and Seixas did not leave the Residence after Sebastian instructed them to do so, they could not be considered invitees or licensees, and could be liable as trespassers. Because it is for the jury, and not the Court on summary judgment, to determine the facts of this case, the factual question of whether and to what extent Scirpo and Seixas were permitted to be on and search the Residence precludes summary judgment. Consequently, with regard to the Plaintiffs' trespass claim, the Defendants' motion for summary judgment is denied.

G. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The Defendants next argue that the doctrine of governmental immunity bars the Connecticut common-law negligent infliction of emotional distress claim against Scirpo and Seixas. "Although municipalities are generally immune from liability in tort, municipal employees historically were personally liable for their own tortious conduct." *Burns v. Bd. of Educ. of City of Stamford*, 228 Conn. 640, 645

(1994). As the Connecticut Supreme Court has held, though, the doctrine of governmental immunity

has provided some exceptions to the general rule of tort liability for municipal employees. [A] municipal employee ... has a qualified immunity in the performance of a governmental duty, but he may be liable if he misperforms a ministerial act, as opposed to a discretionary act.... The word "ministerial" refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion.

Id. (internal quotation marks omitted).

There is no question that Scirpo and Seixas were conducting an investigation into an alleged theft. As one court has noted,

Decisions regarding the scope of an investigation-whether probable cause for an arrest exists, whether information is speedy or not, whether to seek an arrest warrant or make a warrantless arrest, when and how best to pursue a wanted person, the number of police officers that are needed to conduct and complete an investigation, whether coordination with other agencies is necessary during an investigation, the search for a suspect or the pursuit of that suspect is appropriate and the proper supervision of subordinates-all require a municipal police officer to employ wide discretion and to exercise judgment.

Florence v. Plainfield, 909 A.2d 587, 591 (Conn.Super.Ct.2006). In the Court's view, the acts here were discretionary in nature, not ministerial.

*9 This finding, however, does not end the analysis because there are certain recognized exceptions that may dissolve a municipal employee's immunity, regardless of whether the employee's act was discretionary. Connecticut courts

recognize three such exceptions: first, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm ... second, where a statute specifically

provides for a cause of action against a municipality or municipal official for failure to enforce certain laws ... and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.

Burns, 228 Conn. at 645 (internal quotation marks omitted). Here, the Plaintiffs raise only the first exception, i.e., the "imminent harm" to an "identifiable person" exception.

The Plaintiffs' claim does not fall under the imminent harm exception. "Although [the imminent harm] exception to governmental immunity is not well developed in Connecticut law it appears that the type of harm required is physical harm or personal danger...." *Chipperini v. Crandall*, 253 F.Supp.2d 301, 312 (D.Conn.2003) (finding that the results of a wrongful arrest do not constitute "imminent harm") (collecting cases). This case does not present a situation involving physical harm or personal danger. Therefore, Scirpo and Seixas are entitled to governmental immunity for the negligent infliction of emotional distress claim in the complaint. Consequently, with regard to the Plaintiffs' negligent infliction of emotional distress claim, the Defendants' motion for summary judgment is granted.

H. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Connecticut Supreme Court has stated that, in order to recover damages for intentional infliction of emotional distress,

[i]t must be shown: (1) that the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress and (4) that the emotional distress sustained by the plaintiff was severe.

Peytan v. Ellis, 200 Conn. 243, 253 (1986), *superse-
ded by statute on other grounds as recognized in
Chadha v. Charlotte Hungerford Hosp.*, 272 Conn.

776 (2005). "Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine." *Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 210 (2000). " 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Id.* at 210-11 (citing 1 Restatement (Second) of Torts § 46, comment (d) (1965)).

***10** The Court is disinclined to grant summary judgment on this issue. If the jury members believe the Plaintiffs' version of the facts (i.e., Scirpo and Seixas had no authority to be in the Residence), they reasonably could find Scirpo and Seixas liable here. For example, Scirpo entered the bedrooms of Gino and Enza without knocking and without permission. Indeed, with regard to Enza specifically, there is evidence that, when Scirpo entered her bedroom, she was not fully dressed (or she was wearing revealing nightwear), and she was employing a necessary medical device, the use of which she did not want to be widely known because it caused her some embarrassment. [FN7] Consequently, with regard to the Plaintiffs' intentional infliction of emotional distress claim, the Defendants' motion for summary judgment is denied.

FN7. To protect Enza's privacy to the fullest extent possible, the Court shall not disclose the specifics of her medical condition, as they are not material to the discussion here.

I. MUNICIPAL LIABILITY UNDER CONN. GEN. STAT. § 52-557N

The Plaintiffs allege that, pursuant to Conn. Gen.Stat. § 52-557n, the City is liable for the conduct of Scirpo and Seixas. Under the statute, "a political subdivision of the state shall be liable for damages to person or property caused by[] ... [t]he

negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties...." Conn. Gen.Stat. § 52-557n (a)(1)(A). On the other hand, municipalities are not liable for employee acts that "constitute criminal conduct, fraud, actual malice or wilful misconduct...." *Id.* § 52-557n (a)(2)(A).

The Connecticut Supreme Court has construed "wilful misconduct" to be synonymous with "intentional conduct." *See Pane v. City of Danbury*, 267 Conn. 669, 685 (2004). Therefore, a municipality cannot be held liable for the intentional conduct of its employees under Conn. Gen.Stat. § 52-557n; in fact, the Connecticut Supreme Court specifically held in *Pane* that, under Conn. Gen.Stat. § 52-557n, a municipality cannot be held liable for its employees' intentional infliction of emotional distress. *See Pane*, 267 Conn. at 685-86. Therefore, any claim under against the City Conn. Gen.Stat. § 52- 557n for Scirpo's or Seixas' intentional torts, including trespass and intentional infliction of emotional distress, must fail.

This leaves, then, the negligent infliction of emotional distress claim, which, in this case, is the only claim to which Conn. Gen.Stat. § 52-557n could apply. The Court, however, has found that Scirpo and Seixas are entitled to governmental immunity on that claim. Thus, if Scirpo and Seixas cannot be held liable for negligent infliction of emotional distress, *a fortiori* the City cannot held liable under Conn. Gen.Stat. § 52-557n for their negligent infliction of emotional distress, either. Consequently, with regard to the Plaintiffs' claim under Conn. Gen.Stat. § 52-557n, the Defendants' motion for summary judgment is granted.

J. INDEMNIFICATION UNDER CONN. GEN. STAT § 7-465

Under Connecticut statute, municipalities are required to indemnify employees for liability imposed for violations of any person's civil rights as

long as the employee "was acting in the performance of his duties and within the scope of his employment" and the injury "was not the result of any wilful or wanton act." Conn. Gen.Stat. § 7-465(a). The Defendants' only argument here is that because the Plaintiffs cannot establish liability on some of their claims, the City need not provide indemnification on those claims. [FN8]

FN8. Conn. Gen.Stat. § 7-465(a) also provides that "[n]o action for personal physical injuries or damages to real or personal property shall be maintained against such municipality and employee jointly unless such action is commenced within two years after the cause of action therefor arose and written notice of the intention to commence such action ... has been filed with the clerk of such municipality within six months after such cause of action has accrued." These provisions are not at issue here.

*11 The Court agrees that not all of the Plaintiffs' claims have survived summary judgment, and that the City is not liable under Conn. Gen.Stat. § 7-465(a) for those claims. Moreover, Conn. Gen.Stat. § 7-465(a) does not require indemnification for "wilful" acts. As noted above, "wilful" is synonymous with "intentional." Thus, the City is not required to provide indemnification for any intentional infliction of emotional distress or trespass claims. Therefore, with regard to the Plaintiffs' indemnification claim against the City insofar as it is based on claims against Scirpo, Seixas, or Brymer that have not survived summary judgment, the Defendants' motion for summary judgment is granted. In addition, with regard to the Plaintiffs' indemnification claim against the City insofar as it is based on claims of trespass or intentional infliction of emotional distress, the Defendants' motion for summary judgment is granted.

On the other hand, the unreasonable search claim

against Scirpo and Seixas has survived summary judgment. This claim certainly falls under "civil rights" for which Conn. Gen.Stat. § 7-465(a) requires indemnification. Consequently, with regard to the Plaintiffs' indemnification claim against the City insofar as it is based on the unreasonable search claim against Scirpo and Seixas, the Defendants' motion for summary judgment is denied.

III. CONCLUSION

For the foregoing reasons:

(A) Brymer's motion for summary judgment (**dk.t.# 48**) is **GRANTED**. All claims against defendant J. Edward Brymer (Counts Six and Seven) are hereby **DISMISSED**;

(B) the motion for summary judgment by the City, Scirpo, and Seixas (**dk.t.# 47**) is **GRANTED in part and DENIED in part**.

The Court hereby **GRANTS** summary judgment on the following: (1) the Plaintiffs' negligent infliction of emotional distress claim (Count Four); (2) the Plaintiffs' municipal liability claim under 42 U.S.C. § 1983 (Count Eight); (3) the Plaintiffs' municipal liability claim for violations of the Connecticut Constitution (Count Nine); (4) the Plaintiffs' municipal liability claim under Conn. Gen.Stat. § 52-557n (Count Ten); and (5) the Plaintiffs' Conn. Gen.Stat. § 7-465 indemnification claim against the City insofar as it is based on claims against Scirpo, Seixas, or Brymer that have not survived summary judgment, and insofar as it is based on claims of trespass or intentional infliction of emotional distress (Count Eleven).

The Court hereby **DENIES** summary judgment on the following: (1) the Plaintiffs' unreasonable search claim under the Fourth Amendment to the United States Constitution (Count One); (2) the Plaintiffs' unreasonable search claim under Article I § 7 of the Connecticut Constitution (Count Two); (3) the Plaintiffs' trespass claim (Count Three); (4)

the Plaintiffs' intentional infliction of emotional distress claim (Count Five); and (5) the Plaintiffs' Conn. Gen.Stat. § 7-465 indemnification claim against the City insofar as it is based on the unreasonable search claim against Scirpo and Seixas (Count Eleven). *These are the remaining claims for trial.*

****12 The plaintiffs and the remaining defendants are instructed to notify the Court forthwith whether they consent to have this case referred to a United States Magistrate Judge for the purpose of conducting a settlement conference.***

SO ORDERED

Slip Copy, 2009 WL 801614 (D.Conn.)

END OF DOCUMENT

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO.
as guardian for K.H., a minor child,	:	
Plaintiffs,	:	
	:	
V.	:	3:08CV01644(RNC)
	:	
JOHNMICHAEL O'HARE, ET AL.	:	
Defendants.	:	AUGUST 31, 2009

**PLAINTIFF'S LOCAL RULE 56(a)2 STATEMENT
IN OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56(a)2 of the Local Rules of Civil Procedure, plaintiff Glen Harris, individually and on behalf of K.H., a minor child, submits this Local Rule 56(a)2 statement in objection to the defendants' motion for summary judgment:

RESPONSES TO O'HARE AND PIA'S LOCAL RULE 56(a)(1) STATEMENT:

1. On December 20, 2006, Hartford police officers O'Hare and Laureano observed an individual later identified as George Hemingway, drop something and walk away quickly in front of 717 Garden Street, Hartford, CT. *See, Deposition of Pia*, attached as **Exhibit A**, p. 17, lines 16-20; *Deposition of O'Hare*, attached as **Exhibit B**, p. 20, lines 1-19; p. 24, lines 23-25; p. 25, lines 1-4; *Deposition of Laureano*, attached as **Exhibit C**, p. 26, lines 6-13.

Response: Admit

2. George Hemingway was known to O'Hare and Laureano as member [sic] of the West Hill street gang, which was involved in weapons, guns, trafficking narcotics and homicide. *See, Exhibit A*, p. 17, lines 11-15; p. 18, lines 14-21; p. 19, lines 19-25; p. 20, line 1; **Exhibit B**, p. 20, lines 1-19; p. 23, lines 5-18.

Response: Admit, in part: Hemingway was known by Laureano and O'Hare to be involved in a street gang called "Wes Hell." O'Hare heard that Hemingway was "home from a gun charge." The remainder of the paragraph is denied as a violation of Local Rule 56(a)(3) because of hearsay and lack of foundation, as well as relevance. *See, Ex. SJ-10; Ex. SJ-2, p 22,*

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

lines 8-14.¹

3. O'Hare and Laureano then exited their vehicle and picked up what Hemingway had dropped and determined that it was heroin. See, **Exhibit B**, p. 24, lines 13-22; p. 25, lines 19-24; **Exhibit C**, p. 27, lines 5-19.

Response: Admit

4. After identifying the item as heroin, O'Hare and Laureano informed Hemingway to stop and he complied. See, **Exhibit B**, p. 25, lines 5-7.

Response: Admit

5. During the officers' conversation with him, Hemingway informed the officers there were two guns that were placed or about to be placed in an abandoned vehicle located in the backyard of 297 Enfield Street, Hartford, CT. See, **Exhibit C** p. 34, lines 5-17; **Exhibit A**, p. 22, lines 14-19; p. 30, lines 1-15; p. 32, lines 1-7; p. 32, lines 21-25; p. 33, lines 10-25; p. 34, lines 1-2; **Exhibit B**, p. 18, lines 5-20; p. 27, lines 3-25; p. 28, lines 1-12; p. 39, line 25; p. 40, lines 1-7; p. 45, lines 20-25.

Response: Denied: Hemingway had no knowledge of any firearms, and did not tell the officers about any such firearms. Affidavit of George Hemingway, Ex. SJ-18. In any event, neither O'Hare nor Pia were privy to any conversation between Mr. Hemingway and Officer Laureano. Ex. SJ-2, p. 27, lines 6-20; p. 39 line 25, p. 40, lines 1-5; Ex. SJ-3, at 30, line 8-15; p. 32, lines 5-15; Ex. SJ-4, p. 35, lines 17-24; p. 62, lines 8-15; p. 66, lines 4-8; Ex. SJ-11; Ex. SJ-12; Ex SJ-16.

6. The officers were concerned for the public safety, wanted to get guns off the street and possibly even catch the suspect stashing the guns. See, **Exhibit A**, p. 70, lines 20-25; p. 71, lines 1-6; **Exhibit B**, p. 71, lines 1-8; *Affidavit of O'Hare*, attached as **Exhibit D**, p 1, ¶ 6; *Affidavit of Pia*, attached as **Exhibit E**, p 1, ¶ 6.

Response: Denied: See response to ¶ 5. Furthermore, subjective beliefs of parties are irrelevant and inappropriate for proposed summary judgment facts. *See, Kulak v. City of New*

1

The plaintiffs incorporate by reference all exhibits filed with their motion for partial summary judgment filed August 10, 2009, and will refer to the exhibits previously filed with their motion for partial summary judgment when possible. New exhibits by the plaintiffs will continue the sequence, commencing "SJ-18."

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

York, 88 F.3d 63, 71 (2d Cir.1996). In any event, the underlying assertion that the defendants had information concerning firearms is disputed.

7. Officers Pia and O'Hare then drove to 297 Enfield Street. See, **Exhibit A**, p. 34, lines 3-9; p. 38, lines 17-19; **Exhibit B**, p. 46, lines 6-9; p. 47, lines 2-7.

Response: Admit that, at some point, the defendants drove to that address.

8. Officers Pia and O'Hare parked their cruiser a few houses away from 297 Enfield Street, fearing that it could be a set up or an ambush. See, **Exhibit A**, p. 39, lines 4-7; **Exhibit B**, p. 47, lines 2-11.

Response: Denied in part: The subjective beliefs of the defendants are not appropriate for summary judgment. See response to ¶¶ 5, 6.

9. After parking, Officers Pia and O'Hare exited the cruiser and approached 297 Enfield Street. See, **Exhibit A**, p. 39, lines 21-25; p. 40, line 1; **Exhibit B**, p. 48, lines 12-13.

Response: Admit.

10. 297 Enfield Street in Hartford, CT is a large two family house that is painted red and white. See, *Deposition of Glenn Harris*, attached as **Exhibit F**, p. 12, lines 3-4; **Exhibit D**, p 1, ¶ 7; **Exhibit E**, p 1, ¶7.

Response: Admit that the house was large and painted red and white. Denied that it was a two-family house. Only one family – the plaintiffs' – lived there. Glen Harris Dep., Ex. SJ-1, p. 124, lines 15-21.

11. Along the edge of the front yard of 297 Enfield Street was an approximate 4 foot high chain link fence with multiple openings. See, **Exhibit F**, p. 116, lines 6-11; **Exhibit A**, p. 76, lines 17-18; **Exhibit D**, pp. 1-2, ¶¶ 8-9; Photograph 1; **Exhibit E**, pp. 1-2, ¶¶ 8-9; Photograph 1.

Response: Denied in part: The only opening in the chain link fence was across the driveway. The plaintiff does not understand what the defendants mean by "edge of the front yard." There was a gate across the walkway that led from the public sidewalk to the front door. There were no other openings in the fence. Picture of Front Yard, Ex. SJ-8. O'Hare Dep., Ex. SJ-2, p. 66, lines 20-25.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

12. The chain link fence along the front of 297 Enfield Street had a large opening where the driveway was located. See, **Exhibit F**, p. 116, lines 6-11; **Exhibit A**, p. 76, lines 8-18; p. 77, lines 9-16; p. 78, lines 14-19; **Exhibit B**, p. 53, lines 13-24; p. 129, lines 18-25; p. 130, lines 1-17; **Exhibit D**, p. 2, ¶¶ 10-11; Photograph 2; **Exhibit E**, p. 2, ¶¶ 10-11; Photograph 2.

Response: Denied in part: The opening was no wider than the driveway. Ex. SJ-8.

13. There was also a gate in the chain link fence leading to the front door, which was open. See, **Exhibit B**, p. 48, lines 12-16; p. 53, lines 13-24; p. 54, lines 4-7; **Exhibit A**, p. 79, lines 1-6; **Exhibit D**, p. 2, ¶¶ 12-13; Photograph 3; **Exhibit E**, p. 2, ¶¶ 12-13; Photograph 3.

Response: Admit that there was a gate across the chain link fence. The plaintiff is unable to determine whether the gate was open or closed at a particular time since the statement is vague.

14. There was no fence or barrier blocking the view or path of travel to either the front yard or backyard of 297 Enfield Street. See, **Exhibit B**, p. 131, lines 6-10; **Exhibit D**, p. 2, ¶¶ 14-15; Photographs 4a and 4b; **Exhibit E**, p. 2, ¶¶ 14-15; Photographs 4a and 4b.

Response: Admit in part: The front fence did not block the view to the front yard. The house and other barriers prevented view of the backyard from any public area. The view of the back yard was blocked. Ex. SJ-2, p. 51, lines 19-22; p. 52 lines 2-6.

15. Additionally, there was a portion of fencing on the side of 297 Enfield Street that was knocked down. See, **Exhibit A**, p. 76, lines 20-24; p. 77, lines 14-17; **Exhibit D**, p. 2, ¶¶ 16-17; Photograph 5; **Exhibit E**, p. 2, ¶¶ 16-17; Photograph 5.

Response: Denied: Ex. SJ-1 p. 28 lines 22-23, p. 33 lines 19-21, p. 34, lines 1-16.

16. There was no fence or barrier separating the front yard from the backyard at 297 Enfield Street. See, **Exhibit F**, p. 24, lines 4-15; page 25, lines 1-16; p. 45, lines 20-25; p. 46, line 1-18; **Exhibit B**, p. 131, lines 6-10; **Exhibit D**, pp. 2-3, ¶¶ 18-19; Photographs 4a and 4b; **Exhibit E**, p. 2-3, ¶¶ 18-19; Photographs 4a and 4b.

Response: Admit in part. There was no fence separating the front from the back yard, but the house and a dumpster across the driveway constituted a barrier that blocked the rear yard from view. Ex. SJ-2, p. 51, lines 19-22; p. 52 lines 2-6.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

17. There were no “No trespassing” signs on the fence or any other location directing people stay [sic] out of the front or back yard at 297 Enfield Street. See, **Exhibit A**, p. 76, lines 8-14; **Exhibit D**, p. 3, ¶ 20; **Exhibit E**, p. 3, ¶ 20.

Response: Denied. The plaintiff prominently posted “Beware of Dog” signs on three sides of the house at 297 Enfield Street, so the general public would be aware that dogs lived at that address, which any reasonable person would understand to constitute a warning to stay out of the yard. Ex. SJ-1, at p. 46 lines 24-25, p. 47 lines 1-16; Ex. SJ-5.

18. Officers Pia and O’Hare then walked into the front yard of 297 Enfield Street through the opened front gate of the chain link fence. See, **Exhibit B**, p. 48, lines 12-16; p. 54, lines 3-12.

Response: Admit in part. The reference to “then” is too vague to admit or deny.

19. Officers Pia and O’Hare then walked across front yard [sic] and around the right side of house towards the backyard of 297 Enfield Street. See, **Exhibit A**, p. 41, lines 7-9; p. 42, lines 23-25; p. 43, line 1; p. 44, lines 3-10; **Exhibit B**, p. 48, lines 12-16; p. 54, lines 3-21.

Response: See response to ¶ 18.

20. As Officers Pia and O’Hare approached the rear of the residence, they heard movement and rustling in the backyard. See, **Exhibit A**, p. 52, lines 1-14.

Response: Admit in part. Pia heard rustling. There is no evidence that O’Hare heard anything, and movement is not something audible to the human ear.

21. As Officers Pia and O’Hare were walking along right [sic] side of house [sic], O’Hare was in front with Pia behind him. See, **Exhibit A**, p. 49, lines 15-25.

Response: Admit

22. As they proceeded towards the back of the house, Officer O’Hare reached the rear of the residence, and peeked around corner [sic] giving him a partial view of the backyard. See, **Exhibit B**, p. 55, lines 3-15; **Exhibit A**, p. 52, lines 15-21.

Response: Admit

23. When Officer O’Hare peeked around the corner, he observed a large brown and white dog. See, **Exhibit B**, p. 55, lines 15-21; **Exhibit A**, p. 52, lines 22-25; p. 53, lines 1-5; p. 54, lines 3-10; **Exhibit F**, p. 59, lines 18-20; *Deposition of K.H.*, attached as **Exhibit G**, p. 15,

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

lines 11-15.

Response: Admit that the plaintiff's dog was in the backyard.

24. Denied in part. At the same time O'Hare observed the large dog, the dog looked in the direction of the officers and began to growl and charge at them. See, **Exhibit F**, p. 59, lines 21-25; p. 60, lines 1-2; **Exhibit A**, p. 56, lines 7-11; See, **Exhibit B**, p. 62, lines 9-13; p. 63, lines 8-13; **Exhibit G**, p. 15, lines 3-10.

Response: Denied: The plaintiffs' dogs were good-tempered and obedient. They did not bite anyone and listened to the plaintiff when he gave commands. Glen Harris Aff., Ex. SJ-9. Furthermore, K.H. did not remember any aggressive behavior as the dog moved to the front yard. K.H. Dep., Ex. SJ-19, p. 22, lines 13-15.

25. O'Hare then yelled "dog, run." See, **Exhibit A**, p. 56, lines 12-20; **Exhibit B**, p. 63, lines 14-18.

Response: Admit that O'Hare yelled "dog, run." Deny that it occurred in any specific time sequence.

26. Both officers [sic] O'Hare and Pia then turned around and ran back towards the direction they entered the property. See, **Exhibit A**, p. 56, lines 12-20; **Exhibit B**, p. 63, lines 19-24.

Response: Admit in part. See response to ¶ 25.

27. The officers never rounded the corner of the house and entered the back yard, before turning and running back to the front yard. See, **Exhibit D**, p. 3, ¶ 22; **Exhibit E**, p. 3, ¶ 22.

Response: Denied. O'Hare entered the rear yard of the house. Ex. SJ-2, p. 55 lines 3-21.

28. As the officers were running, the large dog chased them and was growling, snapping and lunging at O'Hare. See, **Exhibit F**, p. 60, lines 14-21; p. 62, lines 9-17; **Exhibit A**, p. 30, lines 3-5; p. 65, lines 12-22; **Exhibit B**, p. 64, lines 2-4.

Response: Denied: The plaintiffs' dogs were good-tempered and obedient dogs. They did not bite anyone and listened to the plaintiff when he gave commands. Glen Harris Aff., Ex. SJ-9.

29. Officer Pia rounded the front of the house, ran through front yard and towards the large opening in the chain link fence where driveway [sic] is located. See, **Exhibit A**, p. 56, lines

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

21-25; p. 57, line 1. 30. As Pia rounded the corner and O'Hare followed, the dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner. See, **Exhibit B**, p. 64, lines 5-7; p. 66, lines 3-6; p. 88, lines 1-10; p. 97, lines 9-12; **Exhibit A**, p. 30, lines 3-5; p. 57, lines 8-16; p. 65, lines 12-22.

Response: Denied in part: While plaintiffs do not dispute that Pia ran towards the driveway opening, the plaintiffs' dogs were good-tempered and obedient. They did not bite anyone and listened to the plaintiff when he gave commands. Glen Harris Aff., Ex. SJ-9.

31. When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle [sic] and yell "get back" numerous times in an effort to stop the dog's advance on him. See, **Exhibit A**, p. 57, lines 17-21; p. 59, lines 17-25; **Exhibit B**, p. 64, lines 13-17; p. 65, lines 7-11; p. 67, lines 23-25; page 68, line 1; p. 68, line 25; page 69, lines 1-2.

Response: Admit

32. After O'Hare yelled "get back" numerous times, the dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. See, **Exhibit A**, p. 30, lines 3-5; p. 65, lines 12-22; **Exhibit B**, p. 64, lines 22-25; p. 65, lines 1-3; p. 88, lines 1-10; p. 97, lines 9-12.

Response: Denied: The plaintiffs' dogs were good-tempered and obedient. They did not bite anyone and listened to the plaintiff when he gave commands. Glen Harris Aff., Ex. SJ-9.

33. During this time, Officer Pia was able to run out of the opening in the front yard chain link fence near the driveway. See, **Exhibit A**, p. 57, lines 2-7.

Response: Admit that Pia ran through the opening in the front yard's fence, but deny this occurred in any specific time period or sequence, as it is too vague to admit or deny.

34. However, the dog was gaining too fast on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. See, **Exhibit B**, p. 66, lines 3-6; p. 87, lines 1-2; **Exhibit D**, p. 3, ¶ 23.

Response: Denied. Subjective beliefs of parties do not provide an appropriate basis for summary judgment pursuant to the response to ¶ 6. Moreover the word "however" is vague and argumentative.

35. Even if he had gotten out the driveway, O'Hare believed that the dog would have continued to chase him and he knew that he could not outrun the dog. See, **Exhibit B**, p. 87, lines

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

2-4; **Exhibit D**, p. 3, ¶ 24.

Response: Denied. See response to ¶ 6. Also this statement is argumentative and includes unsubstantiated speculation.

36. When the dog was just about next to and lunging towards him, O'Hare shot the dog, aiming in a downward direction. See, **Exhibit B**, p. 65, lines 4-9; p. 72, lines 24-25; p. 73, lines 1-3; p. 73, lines 10-25; p. 74, lines 1-17; p. 86, lines 11-15.

Response: Admit that O'Hare shot the dog while aiming in a downward direction. The remainder is denied. The plaintiffs' dogs were good-tempered and obedient dogs. They did not bite anyone and listened to the plaintiff when he gave commands. Glen Harris Aff., Ex. SJ-9.

37. O'Hare discharged three shots into the dog stopping it instantly. See, **Exhibit A**, p. 59, lines 3-7; p. 64, lines 11-21; **Exhibit B**, p. 65, lines 4-9; p. 69, lines 3-14; p. 74, lines 18-20.

Response: Denied. O'Hare fired two shots at the dog, which stopped it. Ex SJ-19, p.26, lines 10-23. When K.H. arrived at the front yard, she saw O'Hare standing over Seven, who had fallen to the ground but was still alive and breathing heavily. K.H. Dep, Ex. SJ-14, p. 30, lines 2-14. K.H. screamed "don't shoot my dog." *Id.*, at p. 29, lines 17-24. O'Hare looked at K.H., then back to the dog, and shot the dog in the head. *Id.* The gunshot wound to the head was the cause of death. Necropsy Report, Ex. SJ-20. K.H. ran to her dog, screaming and crying. K.H. Dep., SJ-14, p. 35, lines 1-17; Pia Dep., SJ-3, at 64-65. O'Hare said to K.H., "Sorry, miss, but your dog isn't going to make it." K.H. Dep., SJ-14, p. 35, lines 1-17. K.H. was subsequently hospitalized for suicidal thoughts driven, in part, by her guilt and sadness over Seven's death. K.H. Dep., SJ-19, p. 44, lines 23-25; 45, lines 1-8; p. 46, lines 11-15; p.47, lines 7-14; p. 48 1-15; p. 49, lines 1-18; Glen Harris Dep., Ex. SJ-21, p. 91, lines 16-25; p. 92, lines 1-15.

Disputed Issues of Material Fact

1. Whether George Hemingway ever told Laureano about any firearms.
2. Whether the plaintiffs' dog growled, barked, lunged, or snapped at either defendant.
3. Whether O'Hare paused between the second and third shots, and fired the third shot into the dog's head.
4. Whether K.H. was present when the third shot was fired.
5. Whether K.H. screamed "don't shoot my dog" before O'Hare fired the third shot.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

6. Whether O'Hare turned and looked at K.H. before turning back to the dog and firing the third shot.

RESPONSES TO DEFENDANT CITY OF HARTFORD'S 56(a)(1):

1. The plaintiff has brought the present action against the defendants Johnmichael O'Hare, Anthony Pia and the City of Hartford. See Complaint, attached hereto as Exhibit A.

Response: Admit.

2. The Complaint consists of eight causes of action (counts).

Response: Admit.

3. The First, Second, Third, Fourth, Fifth and Sixth Causes of Action are asserted solely against the defendants Johnmichael O'Hare and Anthony Pia, in their individual capacities, for trespass, intentional infliction of emotional distress, negligence, violation of the Civil Rights Act, violation of the Fourteenth Amendment of the U.S. Constitution and violation of the Connecticut Constitution. These counts also contain allegations that do not amount to actual viable claims and/or causes of action. See Exhibit A.

Response: Admit that the First, Second, Third, Fourth, Fifth and Sixth Causes of Action are asserted solely against the defendants Johnmichael O'Hare and Anthony Pia, in their individual capacities, for trespass, intentional infliction of emotional distress, negligence, violation of the Civil Rights Act, violation of the Fourteenth Amendment of the U.S. Constitution and violation of the Connecticut Constitution. The remainder of the paragraph is denied and is improper in a Local Rule 56(a)(1) statement.

4. In the Seventh and Eighth Causes of Action, the plaintiff asserts claims against the City of Hartford for indemnification only of the defendants O'Hare's and Pia's actions pursuant to Conn. Gen. Stat. Sections 7-101a and 7-465. See Exhibit A.

Response: Admit.

THE PLAINTIFF,
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
JON L. SCHOENHORN
Jon L. Schoenhorn & Associates, LLC

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Summary Judgment\Opposition to Defs SJ\OppSJ-56(a)(2).wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

EXHIBIT SJ-18

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, et al.
Plaintiffs

CIVIL ACTION NO. 3:08CV01644 (RNC)

V.

JOHN MICHAEL O'HARE, et al.
Defendants.

MAY 29, 2009

AFFIDAVIT OF GEORGE HEMINGWAY

STATE OF CONNECTICUT

COUNTY OF HARTFORD

ss. Suffield

I, George Hemingway, being duly sworn according to law, hereby depose and state as follows:

1. I am over the age of eighteen years and understand the obligations of an oath.
2. On the afternoon of December 20, 2006, I was on Garden Street when two police officers drove up and got out of their patrol car. One of the police officers handcuffed me and said it was for his "safety."
3. The officers started questioning me and offered me money if I could tell them where they could find guns. I told the officers I didn't have any information about guns.
4. The officers then released me and drove away.
5. I have never been to 297 Enfield Street and have no knowledge of the property at that address or the people living there.
6. On December 20, 2006, I had no knowledge of any abandoned vehicles, or of any grey Nissan Maximas, and I had no knowledge of any such vehicles being on Enfield Street.
7. On December 20, 2006, I had no knowledge of any firearms located on Enfield Street.
8. On December 20, 2006, I did not tell any police officer about any abandoned vehicles being located on Enfield Street.
9. On December 20, 2006, I did not tell any police officer about any firearms being located on Enfield Street.

I have reviewed the foregoing affidavit and swear, under penalties of perjury, that it is true and correct to the best of my knowledge and belief.

Dated this 7/4/09 day of December, 2006 at Suffield, Connecticut.


GEORGE HEMINGWAY

Subscribed and sworn to before me, this 4 day of July, 2009.

SHAWN SAMUEL REID

Notary Public/Commissioner of Superior Court
MY COMMISSION EXPIRES 09/30/11

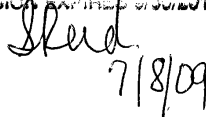

7/8/09

EXHIBIT SJ-19

NICOLE M. GOSSELIN, R.P.R.

. . . Deposition of K.H., taken on behalf of the Defendants in the hereinbefore entitled action, pursuant to the Federal Rules of Civil Procedure, before Nicole M. Gosselin, R.P.R., duly qualified Notary Public in and for the state of Connecticut, held at the law offices of Howd & Ludorf, LLC, 65 Wethersfield Avenue, Hartford, Connecticut, commencing at 1:34 p.m., on Wednesday, May 6, 2009 . . .

K . H . ,
of 213 Barbour Street, Hartford, Connecticut,
being first duly sworn by Nicole M. Gosselin, R.P.R.,
a Notary Public within and for the state of
Connecticut, was examined, and testified on her
oath as follows:

1 wouldn't have caught him. I wouldn't be able to like block
2 him inside the yard.

3 Q Okay. So what did you think was going on when
4 you saw him suddenly run towards the front yard?

5 A I didn't know what to think. I just wanted to
6 get to the yard.

7 Q And you thought that the best way to stop that
8 would be for you to get onto the driveway and come around
9 that way and --

10 A Cut him off, yes.

11 Q All right. If he was going to leave the yard,
12 would he have had to have left the yard by the driveway?

13 A Yes. And if he would have saw me, he would have
14 stopped. Because I would have told him to.

15 Q Okay. Did you say anything to him when he first
16 suddenly ran towards the front?

17 A There was no time to. It was -- He was gone.

18 Q All right. He ran quickly?

19 A Yes.

20 Q Okay. Was it apparent to you that he wasn't
21 just wandering around; he had seen something and was
22 reacting to it?

23 A I don't know what he was thinking. I just know
24 he left.

25 Q He left quickly?

1 A Yes.

2 Q Now, we are using the word "bolted" in
3 questions, and I'll tell you I'm using that word because
4 that's what your dad told me. Do you think that's a fair
5 characterization?

6 A If you describe it.

7 Q "Bolted" means to start from a stop, to suddenly
8 leave and to leave quickly?

9 A Yes.

10 Q Okay. Versus taking your time and getting
11 there, correct?

12 A Yes.

13 Q Okay. Do you know if Seven barked at all when
14 he ran, when he left quickly?

15 A I don't remember.

16 Q So he might have, he might not have, you just
17 don't remember; is that what you are telling me?

18 A Don't remember.

19 Q Okay. We're kind of waltzing right into this
20 spot where I'm going to ask you questions about the shots
21 that are fired. Is it okay if we talk about that now?

22 A Do I have a choice?

23 Q You don't have a choice -- You do have a choice.
24 You can do it a little later if you want to try and take a
25 break and get ready for it?

1 A Towards the top.

2 The police officer or Seven?

3 Q I said "Seven," didn't I?

4 A And Seven --

5 MR. SCHOENHORN: You said "he."

6 MR. GERARDE: Who am I referring to? I
7 meant Seven.

8 A Yes, he was in the front, this here.

9 BY MR. GERARDE:

10 Q And by the time you first saw him as you came
11 around the Dumpster, was Seven already on the ground?

12 A Yes.

13 Q He had already been shot at least once?

14 A Yes.

15 Q Do you remember how many times?

16 A Twice.

17 Q Did you see Seven get shot the first time?

18 A No.

19 Q Second time?

20 A The first two shots were like bam-bam, so it
21 wasn't like it was space between them.

22 Q The first two shots were bam-bam?

23 A Yes.

24 Q All right. And where do you think you were when
25 you heard those shots?

1 A I was running towards the front.

2 Q Okay. But I imagine you would have been --

3 A I was at the Dumpster, just like getting from
4 the Dumpster to get to the front of the house.

5 Q Okay. So if we use Exhibit C, we can't see the
6 Dumpster in the exhibit, but we have been told by your dad
7 that the Dumpster is behind where his truck is parked?

8 A Yes.

9 Q All right. So, obviously, your dad's truck was
10 not in the driveway when this happened because he was at
11 work, right?

12 MR. SCHOENHORN: It was.

13 MR. GLEN HARRIS: It was.

14 A It was, yes, he has two trucks.

15 MR. GERARDE: Okay. Well, thank you for
16 clarifying that.

17 BY MR. GERARDE:

18 Q Okay. So this vehicle we are looking at in
19 Exhibit 1-C, that vehicle was there on the day the police
20 showed up?

21 A Yes.

22 Q And it was parked in front of the Dumpster we
23 see in 1-E?

24 A Yes.

25 Q And are you saying that when the first two shots

1 happened? Just give me some generic information there?

2 A I was locked in the girls' bathroom with girls
3 who wanted to fight me. But I got out.

4 Q Did that happen at Fox?

5 A Yes.

6 Q Okay. And who were these girls? Were they
7 neighborhood girls that carried it into school or what?

8 A They weren't neighbor -- They were people that
9 went there.

10 Q You didn't see them around the neighborhood; you
11 just saw them when you were at school?

12 A I don't, I don't hang out outside. I stay in
13 the house unless I'm walking the dog, and then I go to the
14 park or something like that, somewhere quiet.

15 Q What park do you walk to?

16 A I believe it's Waverly Park, but I'm not
17 positive. I can't go to Keney Park, so I'm just kind of
18 somewhere close to -- I don't go into any parks, just like
19 walk around it.

20 Q All right. And then have you had any bullying
21 issues at the Learning Corridor?

22 A No.

23 Q Okay. The notes that were found that resulted
24 in you getting sent to the Connecticut Children's Hospital,
25 those are notes that you wrote?

1 A Yes.

2 Q And was it a deliberate note that started on a
3 piece of paper or was it a running journal or what?

4 A I couldn't consider it a journal because I wrote
5 to express my feelings because I didn't feel comfortable
6 talking to anybody else. So it was writing to write my
7 feelings, but I wouldn't talk to anybody, so I would just
8 write it on a piece of paper.

9 Q Okay. And give me an idea, how long was the
10 note? Was it more than one page, was it ten pages long, or
11 was it just a --

12 A I don't know. Depends on how mad I was.

13 Q I'm just, well...

14 A Only wrote when I was mad, so...

15 Q Yes. Okay. I read something in one of these
16 records about a science teacher finding something. Is that
17 how someone found out?

18 A I left my notebook in her class.

19 Q Okay. Was this your basic notebook that you
20 would take to your classes?

21 A No, it's not a basic notebook. It was a
22 notebook that I had for one of my classes, but we never
23 needed a notebook, so I started writing in it, and, yeah.

24 Q And so she found your notebook and read what you
25 wrote, and that's how it all started?

1 A Yeah.

2 Q Is that notebook still around?

3 A I don't have that notebook.

4 Q Did the school give it back to you?

5 A I never received that notebook. I don't know if
6 the school probably gave it to my parents, but I didn't get
7 the notebook back.

8 Q But what do you remember writing that was like
9 the last thing that you wrote? They said things were
10 getting progressively worse?

11 A I wished I was dead, I hate my life and I'm fat,
12 and I have myself hanging from a tree or a pole.

13 Q Okay. Was there any like incident in school
14 that prompted you to write that?

15 A No.

16 Q You mentioned that there was a time when you
17 weren't getting along with Tashonna Ayers. Was there
18 something that happened with her that prompted you to write
19 that?

20 A Well, I kind of blamed it on my chores, but that
21 wasn't the honest, it wasn't the real reason why.

22 Q All right, so you've told me that you write when
23 you're angry?

24 A Yes.

25 Q So at some point you got mad, and you started

1 writing, right?

2 A Yeah, but when they found the notebook, I told
3 them it was my chores.

4 Q That your chores --

5 A Yeah, because like I had a lot of chores.

6 Q Right.

7 A So it was part of the reason. But one of her
8 comments made it seem like Seven's death was my fault, and
9 like I had enough guilt knowing that it was my fault, but
10 for people to say that it was made it a whole lot worse.

11 Q You said Tashonna said that?

12 A No, it was a comment. She doesn't know she said
13 it. It's just like the words she used, and the problem or
14 situation made it seem that Seven's death was my fault.

15 Q Okay. So something she said, you took it that
16 way, that she --

17 A I took it that way, but it wasn't probably meant
18 that way.

19 Q Okay. So now where did chores fit into this?
20 You said that they think it was because of chores?

21 A Yeah, because I always complained about my
22 chores.

23 Q And in your writings did you do that?

24 A Probably. I don't think -- I explained how I
25 hated her but I don't think chores was mentioned.

1 Q Okay. So if we had the notebook in front of us
2 and read like the last entry, what do you think that last
3 entry would say?

4 A The last entry had me hanging from something.

5 Q Has you hating what?

6 A Had me hanging from something.

7 Q Oh, hanging. That's it, just a picture?

8 A Yeah.

9 Q Okay. If we were to read the last things that
10 were written, because the science teacher read something
11 and that's why or when she called --

12 A That was before the picture.

13 Q What do you think that said?

14 A I wish I was dead. I hate my life. I hate my
15 mother. I think I'm fat, I'm ugly, and I want to die.

16 Q I think I'm ugly, I think I'm fat, I want to
17 die?

18 A Yes.

19 Q Why did you think that?

20 A Because I thought that. That's how I felt.

21 Q Okay. Did it say anything about Tashonna Ayers?

22 A In one piece that I hate her.

23 Q Okay. Did any of the writings say anything
24 about Seven?

25 A I don't remember. I doubt it.

1 Q Okay.

2 A In that notebook, no, but in another one, yes.

3 Q What about the other one, what do you mean?

4 A I've had more than one notebook. I don't write
5 in one spot, so...

6 Q What do you think you wrote when you wrote about
7 Seven in another notebook?

8 A Like having no one to talk to.

9 Q Do you think that that problem is solved to the
10 extent that you can now talk to your dad that you were
11 telling me about before?

12 A I can still talk to my dad but my dog
13 understood -- Seven understood more than anybody. He like
14 understood. And it sounds crazy from people who are not
15 dog lovers, but it's like he gave feedback, like I
16 understand what he was trying to say to me in some way, but
17 no one could really understand that because they just don't
18 know.

19 Q Do you have a similar relationship with Deuce?

20 A Me and Deuce talk.

21 Q Okay. I mean, does he understand you, do you
22 think?

23 A He knows when I'm mad or upset about something.
24 And he would, he does stuff to make me laugh to like give
25 me distraction, and it usually works, so I can say he does

EXHIBIT SJ-20

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT


GLEN HARRIS, individually and P.P.A. : CIVIL ACTION NO. 3:08CV01644
as guardian for K.H., a minor child, : (RNC)
Plaintiffs :
V. :
JOHNMICHAEL O'HARE :
ANTHONY PIA, and :
CITY OF HARTFORD, :
Defendants. : AUGUST 19, 2009

AFFIDAVIT OF KATHLEEN DEERING


I, Kathleen Deering, being duly sworn according to law, hereby depose and state as follows:

1. I am over the age of eighteen and understand the obligations of an oath.
 2. I have been a Doctor of Veterinary Medicine since 1988.
 3. I performed the necropsy on the body of Glen Harris's 3 year old St. Bernard, named "Seven," under the supervision of Dr. R. French, DVM, PhD.
 4. I prepared the necropsy report in the ordinary course of business of the Connecticut Veterinary Medical Diagnostic Laboratory.
 5. I had a duty to prepare the necropsy report.
 6. The necropsy report was prepared contemporaneously with the actual necropsy.
 7. The necropsy report is a true and accurate reflection of our findings.
 8. A true and accurate copy of the necropsy report is attached hereto as Exhibit A
- I have reviewed the forgoing affidavit and swear, under penalties of perjury, that is true and correct to the best of knowledge and belief.

Dated this 24th day of August, 2009 at Storrs, Connecticut.


Kathleen Deering

Subscribed and sworn to before me on this 24th day of August, 2009.


Notary Public/Commissioner of the Superior Court

SUSAN P. HAYES

NOTARY PUBLIC

MY COMMISSION EXPIRES OCT. 31, 2009

EXHIBIT A



Connecticut Veterinary Medical Diagnostic Laboratory

Department of Pathobiology and Veterinary Science • College of Agriculture and Natural Resources
61 North Eagleville Road Unit 3089 • Storrs, CT 06269-3089
phone: 860-486-3738 • fax: 860-486-2737 • web: www.pathobiology.uconn.edu/cvmdl

Vet: MacDonald Vet Hospital
267 Cottage Grove Rd.
Bloomfield 06002

LOCATION OF ANIMAL
67 Lebanon St.
Hartford CT 06112

Accession No06 -13555

FINAL REPORT

GLEN HARRIS
67 LEBANON ST.
HARTFORD CT 06112

Date Collected: 10/20/2006
Date Submitted: 12/22/2006
Date Reported: 11/14/2007

PH: 860-7279559

Animal ID:	Species:	Breed:	Sex:	Age:	Wt:
Seven	canine		M	Adult	120 lb

PATHOLOGIC FINDINGS

HISTORY:

Owner says daughter brought animal out to urinate. The police apparently entered the fenced-in yard that had "Beware of Dog" sign. The animal proceeded to lunge at the officers not growling or acting aggressive. The office shot the dog several times killing the animal. The animal was taken by the police to a vet. The vet according to the owner took the bullets from the dog and turned the dog over to the owners vet. Owners brought animal to CVMDL after hours 12/21/06. Owners are hoping to find the trajectory of the bullets. CVMDL was recommended by the owners lawyer and vet as they will likely be taking the Hartford Police to court.

GROSS FINDINGS:

A 3-year and 2-month-old, intact male, Saint Bernard canine was submitted for necropsy. There is blood in and around the right nares and muzzle and right external ear canal. Grass is present in the oral cavity. Blood soaked fur is present over the right frontal, temporal and parietal regions of the head. There is a 1cm (horizontal) by 1.3 cm (vertical) ovoid, full skin thickness, penetrating wound in the dorsocranial aspect of the frontal region of the head, just to the right of midline. The cranial ventral edge of this skin lesion is beveled. The hole extends through the frontalis muscle and leads to a palpable hole in the frontal bone of the skull. A large flask-shaped, 9 x 13 cm section of the right occipital bone, and portions of the right parietal and temporal bones, is shattered. The right cerebral cortex and cerebellum is macerated, bloody and penetrated by bony fragments, in the splenial, supra- and post-splenial, and occipital regions. A 1.5cm diameter, flattened (0.9 cm thick), mushroom-shaped metallic foreign body is lodged in the musculature, to the right of the 2nd cervical vertebra (C2). There is a second, full thickness, ovoid, 1cm (horizontal) by 1.7cm (vertical) skin wound, with a beveled dorsal edge, in the right cranial chest below the point of the shoulder, and it is surrounded by bloody fur. From this wound, a caudoventrally directed tunnel through muscle is palpable and verified by dissection. This tunnel extends from the ovoid skin wound, through the muscles along the lateral aspect of the right chest wall, to the right ventrolateral aspect of the right 6th rib and sternebra, where a second 2cm diameter, flattened (0.9 cm thick), mushroom-shaped metallic foreign body is lodged. A subcutaneous, partially involving muscle, 7 x 5.75 cm, hematoma is present over the foreign body and the overlying skin is bruised (3.8 x 2.1 cm). The dissecting track contains fur. There is frothy fluid in the trachea and the left and cranial right lung lobes are reddened. There is a small amount of ingesta in the stomach, the distal jejunum is hyperemic, and the splenic tail is congested. There is a large amount of soft, formed stool in the descending colon and 145cc of urine in the bladder.

RADIOGRAPHS:

The caudolateral aspect of the braincase is disintegrated, with 12 large metallic fragments, innumerable tiny metallic and several large and poorly discernible bony fragments, dispersed throughout the right cranium and lateral soft tissue. The radiographic image of the caudal edge of the occipital bone ends abruptly, below the external occipital protuberance. A large, 2cm diameter, irregularly rounded, metallic object is present cranial and lateral to the axis

Owner: Glen Harris

Pg #2

Accession No:06-13555

(C2). A large, 2.1-2.2 cm diameter, 6-pointed, snowflake-shaped metallic object is present in the right lateral chest wall at the level of the 6th sternebra and rib. The metallic foreign body is surrounded by a round, gas-radiodense pocket and, just cranial, a second gas pocket is present. The stomach and intestines are filled with gas, and the descending colon contains formed stool.

HISTOPATHOLOGY:

SLIDES A & B. LUNG: Against a background of postmortem autolysis (eosinophilic material in alveolar spaces, scattered foci of bacterial overgrowth, pale and indistinct alveolar septae, sloughed respiratory epithelial cells), there are red blood cells present in alveoli in mild to moderate numbers (compatible with aspiration of blood).

SLIDES C, F & J. SPLEEN: Against a background of marked postmortem autolysis (PMA), no significant lesions (NSL) are seen.

SLIDE D. PANCREAS: Against a background of marked postmortem autolysis (PMA), no significant lesions (NSL) are seen.

DUODENUM: Against a background of marked postmortem autolysis (PMA), no significant lesions (NSL) are seen.

SLIDE E. LIVER: Against a background of marked postmortem autolysis (PMA), no significant lesions (NSL) are seen.

SLIDE F. KIDNEY: Against a background of PMA, NSL are seen.

URETER: Against a background of PMA, NSL are seen.

SLIDE G. KIDNEY: Against a background of PMA, NSL are seen.

TESTIS: Against a background of PMA, there are there are small numbers of sperm present in seminiferous tubules.

SLIDE H. THYROID GLAND: Against a background of PMA, NSL are seen.

LYMPH NODE: Against a background of PMA, NSL are seen.

PAROTID SALIVARY GLAND: Against a background of marked postmortem autolysis (PMA), no significant lesions (NSL) are seen.

SMALL INTESTINE: Against a background of PMA, NSL are seen.

SLIDE I. ADRENAL GLANDS: Against a background of PMA, NSL are seen.

THYROID GLAND: Against a background of PMA, NSL are seen.

PARATHYROID GLAND: Against a background of PMA, NSL are seen.

SLIDE J. SMALL INTESTINE: Against a background of severe postmortem autolysis, NSL are seen.

SLIDE K. STOMACH, BODY: Minimal to mild, multifocal lymphocytic and plasmacytic aggregates and follicular hyperplasia are present at the base of the lamina propria. Numerous large bacilli (consistent with postmortem bacterial overgrowth) are scattered throughout the section.

ESOPHAGUS: Against a background of PMA, NSL are seen.

SKELETAL MUSCLE: Against a background of PMA, NSL are seen.

SLIDE L. ESOPHAGUS: Against a background of PMA, NSL are seen.

GUT: Against a background of PMA, NSL are seen.

SLIDE M. STOMACH: Against a background of PMA, there are frequent spiral-shaped bacilli (consistent with *Helicobacter*) deep within glands. A single focus of minimal lymphoplasmacytic infiltration is present at the base of the lamina propria.

COLON: Against a background of PMA, NSL are seen.

SLIDE N. DUODENUM: Against a background of PMA, NSL are seen.

JEJUNUM: Against a background of PMA, NSL are seen.

SLIDE O. URINARY BLADDER: Against a background of PMA, NSL are seen.

SKELETAL MUSCLE: NSL.

BONE MARROW: NSL

Owner: Glen Harris

Pg #3

Accession No:06-13555

SLIDE P. HEART: NSL
SKIN: NSL

BRAIN: Against a background of FMA, NSL are seen.

BRAIN SECTIONS: SEE GROSS DESCRIPTION.

SLIDES Q - V. BRAIN, CEREBRAL CORTEX, MIDBRAIN, THALAMUS: There is severe, multifocal hemorrhage in the neuropil. Moderate to marked, multifocally extensive, hemorrhage is present in the leptomeninges. Mild congestion of vessels is occasionally present.

LABORATORY FINDINGS

BACTERIOLOGY RESULTS:

Seven Animal - Urine culture: No growth.
kg 12/28/2006

DIAGNOSIS

MORPHOLOGIC DIAGNOSIS:

BRAIN. Severe, terminal, focally extensive, cerebral cortical, cerebellar, midbrain and thalamic maceration and hemorrhage, with leptomeningeal hemorrhage (consistent with a gunshot).
CALVARIUM. Through and through penetrating wound, with entrance at the right frontal bone and exit at, with compound fractures of, the right occipital bone (consistent with a gunshot).
TRUNK. Penetrating wound with entrance at the right cranial chest and bullet (consistent with discharged hollow-point bullet) lodged in right ventrolateral chest wall at level of 6th rib and sternum.
RIGHT CERVICAL MUSCULATURE. Metallic foreign body (consistent with discharged hollow-point bullet) lodged in musculature to the right of 2nd cervical vertebra.
STOMACH. Gastric Helicobacteriosis, with minimal to mild, chronic, multifocal, lymphoplasmacytic gastritis.

FINAL DIAGNOSIS:

Gunshot wound to the brain and chest wall
Two metallic foreign bodies (consistent with bullets) lodged in musculature (neck and chest wall)
Gastric Helicobacteriosis

COMMENTS:

The immediate cause of death was due to the gunshot to the brain.

Photo and radiographic documentation, and the two recovered bullets, are archived at the CVMML.

K. Deering, DVM
R. French, DVM, PhD

EXHIBIT SJ-21

-----X
DEPOSITION OF GLEN HARRIS

JON L. SCHOENHORN & ASSOCIATES, LLC
Attorneys for the Plaintiffs
108 Oak Street
Hartford, Connecticut 06106-1514
(860) 278-3500

HOWD & LUDORF, LLC
Attorneys for the Defendants
65 Wethersfield Avenue
Hartford, Connecticut 06114-1190
(860) 249-1361

OFFICE OF THE CORPORATION COUNSEL
Attorneys for the City of Hartford
550 Main Street
Hartford, Connecticut 06103
(860) 757-9700

NICOLE M. GOSSELIN, R.P.R.

. . . Deposition of GLEN HARRIS, taken on behalf of the Defendants in the hereinbefore entitled action, pursuant to the Federal Rules of Civil Procedure, before Nicole M. Gosselin, R.P.R., duly qualified Notary Public in and for the state of Connecticut, held at the law offices of Howd & Ludorf, LLC, 65 Wethersfield Avenue, Hartford, Connecticut, commencing at 10:20 a.m., on Wednesday, May 6, 2009 . . .

G L E N H A R R I S ,

of 213 Barbour Street, Hartford, Connecticut,
being first duly sworn by Nicole M. Gosselin, R.P.R.,
a Notary Public within and for the state of
Connecticut, was examined, and testified on his
oath as follows:

1 Connecticut Children's Medical Center?

2 MR. SCHOENHORN: Can K come back in?

3 MR. GERARDE: Do you want her back in for
4 that?

5 MR. SCHOENHORN: Well, are we...

6 MR. GERARDE: I was going to talk about
7 that she was brought in for a suicide attempt.

8 THE WITNESS: She can come in for that.

9 MR. SCHOENHORN: She was there for that,
10 so, yes, why don't you just ask her to come in
11 because it's easier for you to get up than for
12 me to get up.

13 (K entered the room.)

14 BY MR. GERARDE:

15 Q All right. We have K back in the room.

16 And we are now going to speak about the records
17 I received yesterday from your attorney regarding an
18 admission to the Connecticut Children's Medical Center.
19 I'm reading in these records that the reason for the
20 admission was a suicidal ideation, meaning thoughts of
21 suicide.

22 A Yes.

23 Q All right. Now, was this the same event that
24 you've told me about earlier when she was taken from school
25 by ambulance?

1 A Yes.

2 Q How did you find out about that?

3 A School called me.

4 Q And you were at work, obviously?

5 A Yes.

6 Q And was she taken by ambulance to the
7 Connecticut Children's Medical Center?

8 A Yes.

9 Q And I take it you went and met her there?

10 A Yes.

11 Q And her doctors?

12 A Yes.

13 Q Did you have any information yourself about like
14 threats or thoughts of suicide by K before this time that
15 she was taken to the hospital?

16 A Her teachers advised me that they had found
17 things she had written previously. But other than that,
18 no.

19 Q What had she written previously?

20 A She didn't like herself, she didn't like her
21 life, things of that nature.

22 Q Is the first time she ever spoke to someone in
23 the nature of a therapist, not a doctor that heals physical
24 issues but like a therapist, is the first time she ever
25 spoke to anyone in the nature of a therapist when she saw

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 31, 2009

**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT DATED AUGUST 10, 2009**

The defendants, O'Hare and Pia, incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009 in response to the plaintiffs' Motion for Partial Summary Judgment. The defendants further state: (1) the entry into the property was not a Fourth Amendment search; (2) the killing of the dog was not an unreasonable seizure search, as the dog posed an imminent threat to the officers; (3) the officers are entitled to qualified immunity for the entry into the property and the killing of the dog; (4) the plaintiffs fail to plead a viable claim under the Connecticut Constitution; (5) the officers did not trespass onto the property as they were licensees; and (6) the conversion claim fails, as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified.

A. THE OFFICERS' ENTRY INTO THE PROPERTY WAS JUSTIFIED AS IT WAS NOT A FOURTH AMENDMENT SEARCH

The plaintiffs claim that they possessed a reasonable expectation of privacy in their yard as it constituted curtilage. (Pl. Br. at pp. 7-9). However, the area was not curtilage, as there was no reasonable expectation of privacy to the portion of the plaintiffs' yard the officers entered. (See, Defendants' Memorandum of Law in Support of Motion for Summary Judgment dated August 10, 2009 for applicable case law).

Here, the officers entered the front yard through the open gate and then walked along the right side of the house. Before entering the back yard they saw the dog, turned around and ran. This area of the yard was not enclosed, and the plaintiffs took no steps whatsoever to protect said area from entry or from view. Therefore, there was no reasonable expectation of privacy to the portion of the plaintiffs' yard the officers entered, so the officers' entry was not a Fourth Amendment search. (Def. Br. at pp. 6-7)

First, it is undisputed that the yard was not enclosed. There was no fence that enclosed the property, and in fact, the front gate to the chain link fence was left open. Along the edge of the front yard of the property was an approximate 4 foot high chain link fence with multiple openings. The chain link fence had a large opening where the driveway was located. There was also a gate in the chain link fence leading to the front door, which was left open. (Def. Br. at p. 7); (Pl. Stat. of Facts, p. 2, ¶ 11)

Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard. Furthermore, there was a portion of fencing on the side of the property that was knocked down. Finally, there was no fence or barrier

separating the front yard from the backyard. Therefore, it is undisputed that the property was not enclosed. (Def. Br. at pp. 7-8); (Pl. Stat. of Facts, p. 2, ¶ 10)

Furthermore, the plaintiffs took no steps to protect their property from entry or from view. Neither the front yard nor back yard was enclosed by fencing or some other barrier. There was a large opening in the front fence where the driveway was located, and the front gate was left open. There was also no fencing or other barrier separating the front yard from the back yard. Therefore, anyone could simply walk from the street through the driveway opening, or open front gate, into the front yard and then access the back yard along either side of the residence. (Def. Br. at p. 8)

Finally, there was no stockade or similar type fencing in the front yard blocking ones view. There was merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no “No trespassing” signs or anything to that effect to keep people out of the property. (Def. Br. at p. 8)

Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private. Kirchoff, 156 Vt. at 10.

While the plaintiff claims that he erected a “Beware of Dog” sign on his house (Pl. Br. at p. 7), this does not apprise a person that the area is private, but simply that a dog is present. While the plaintiffs claim that O'Hare observed this sign, they fail to inform the court that O'Hare testified that he knew there was a Beware of Dog sign *only* after he reviewed photographs of the scene (after litigation was commenced), but specifically could not see said sign when they entered the property. (See, **Exhibit** SJ-2 at 69-70 to Plaintiff's Motion for Summary Judgment.) Furthermore, Pia unequivocally testified that at no time prior to entering the property did he observe the “Beware of Dog sign. (See,

Exhibit A, p. 71 to Defendants' Memorandum of Law in Support of Motion for Summary Judgment)

Moreover, there are many other cases, involving similar circumstances to the present case, where the court found that the area accessed by the police did not constitute curtilage. See, U.S. v. Hayes, 551 F.3d 138, (2d Cir. 2008) (Path taken by police canine to east of house and through backyard to sniff scrub brush located 65 feet from back door of house and on border of neighbor's property, which revealed black bag containing narcotics in brush, did not invade the curtilage of the home for Fourth Amendment purposes; there was an alternative path to backyard along driveway in full view of street which was plainly outside curtilage, narcotic smell was so strong it could be smelled from 65 feet away, and if canine had taken alternate path he would have led officer to bag); Simko v. Town of Highlands, 276 Fed.Appx. 39, 2008 WL 1925143 C.A.2 (N.Y.), May 01, 2008 (Court held that trees, bushes, and stumps around property did not significantly limit access or visibility and therefore area was not within curtilage of property); United States v. Reyes, 283 F.3d 446, 466-67 (2d Cir.2002) (no "search" where officers enter a driveway across which a chain was hung); United States v. Williams, 219 F.Supp.2d 346, 360 (W.D.N.Y.2002) (no expectation of privacy in driveway exposed to public); United States v. Hogan, 122 F.Supp.2d 358 (E.D.N.Y.2000) (yard in close proximity to house not part of curtilage where it is exposed to public view and no evidence that intimate activities associated with domestic life occurred there); State v. Hall, 719 A.2d 435 (Vt.,1998) (Officer was not within curtilage of defendant's house when officer viewed marijuana plant from wooded area behind house. Officer was standing five to ten feet from lawn in area just inside woods;

only fencing behind defendant's house was ornamental, area where officer stood as well as where marijuana was located was beyond fence, there was no evidence that area was used for activities such as picnics, barbecues or other "privacies of life," and defendant had not erected any fences or walls that would obstruct view of yard.)

Clearly, the facts in the present case do not support a conclusion that the area of the plaintiffs' yard where the officers entered was curtilage. The officers entered the front yard through the open gate and then walked along the right side of the house. Before entering the back yard they saw the dog, turned around and ran. The area of the yard they entered was not enclosed and the plaintiffs took no steps whatsoever to protect said area from entry or view. Accordingly, the area was not "curtilage" and the plaintiffs did not have a reasonable expectation of privacy to said area. Therefore, the officers' entry was not a Fourth Amendment search and summary judgment should enter in favor of the officers on the plaintiffs' Fourth Amendment claim.

B. THE KILLING OF THE DOG WAS NOT AN UNREASONABLE SEIZURE, AS THE DOG POSED AN IMMINENT THREAT TO THE OFFICERS

The plaintiffs claim that the officers illegally seized their property by shooting and killing the dog. (Pl. Br. at pp. 15-17) However, the killing of the dog was not an unreasonable seizure, as the dog posed an imminent threat. (See, Defendants' Memorandum of Law In Support of Motion for Summary Judgment dated August 10, 2009 for applicable law).

At the same time the officers observed the large dog, the dog looked in their direction and began to growl and charge at them. As the officers were running, the

large dog was growling, snapping and lunging at O'Hare. The dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner. (Def. Br. at p. 11)

When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog. The dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. The dog continued to gain on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. Even if he had gotten out the driveway, O'Hare believed that the dog would have continued to chase him. Therefore, it is undisputed that the dog posed an imminent threat. After making every effort to outrun the dog and get the dog to stop by yelling get back, O'Hare was left with no other choice than to shoot the dog as he believed that it was about to attack him. (Def. Br. at p. 11)

Officer O'Hare claims he discharged three rapid succession shots into the dog stopping it instantly. However, the minor plaintiff claims that O'Hare paused between his second and third shots, and did not shoot for a third time until after she called out, "don't shoot my dog." Even under the minor plaintiff's version that the dog had been shot twice, before she called out "don't shoot my dog", did not diminish the threat posed by the dog to the officer. (Def. Br. at p. 12)

Moreover, the plaintiff wrongfully claims that O'Hare and Pia were aware that dogs might be present on the property. (Pl. Br. at p. 16) First, Pia unequivocally testified that at no time prior to entering the property did he observe the "Beware of Dog" sign. (See, **Exhibit A**, p. 71 to Defendants' Memorandum of Law in Support of Motion

for Summary Judgment) Also, O'Hare was unsure if he saw said sign prior to entering the property and claimed that he was aware of the sign *only after* reviewing photographs of the residence after litigation commenced. (See, **Exhibit** SJ-2 at 69-70 to Plaintiff's Motion for Summary Judgment.)

Accordingly, Officer O'Hare made every effort to outrun and even stop the dog. However, after his attempts proved to be unsuccessful, and he observed the dog displaying threatening and aggressive behavior in his direction, he determined that the dog posed an imminent threat to him, and was left with no other choice than to shoot the dog. These facts are undisputed. Therefore, there was no unreasonable seizure, and summary judgment should enter in his favor as to the plaintiffs' Fourth Amendment claim.

C. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR THE ENTRY INTO THE PROPERTY AND THE KILLING OF THE DOG

At a minimum, the officers are entitled to qualified immunity for the entry into the property and killing of the dog. (See, Defendants' Memorandum of Law In Support of Motion for Summary Judgment dated August 10, 2009 for applicable law).

In the present case, it was objectively reasonable for the officers to believe that the plaintiffs' yard was not "curtilage" and their entry was not a Fourth Amendment search. First, it is undisputed that the yard was not enclosed. There were no fences that enclosed the property, and in fact, the front gate to the chain link fence was left open. Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard.

Also, the plaintiffs took no steps to protect their property from entry or view. Neither the front yard nor the back yard was enclosed by fencing or some other type of barrier, there was a large opening in the front fence where the driveway was located and the front gate was left open. There was also no fencing or barrier separating the front yard from the back yard. Therefore, anyone could simply walk from the street through the driveway opening, or open front gate, into the front yard and then access the back yard along either side of the house. Further, there was no stockade or similar type fencing in the front yard blocking ones view. There was merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no "No trespassing" signs or anything to that effect to keep people out of the property. Therefore, it was objectively reasonable for the officers to believe that the plaintiffs' yard was not "curtilage" and their entry was not a Fourth Amendment search.

It was also objectively reasonable for O'Hare to believe that the dog posed an imminent threat. It is undisputed that the dog chased O'Hare, he attempted to elude the dog, the dog closed in on him and that the dog was shot at close range. Therefore, it was objectively reasonable for O'Hare to view the dog as an imminent threat, which justified his use of deadly force.

D. THE PLAINTIFFS' CONNECTICUT CONSTITUTION CLAIM FAILS AS THEY HAVE FAILED TO PLEAD A RECOGNIZED CLAIM, AND EVEN IF THEY HAD, O'HARE'S ACTION OF KILLING THE DOG WAS JUSTIFIED, AS THE DOG POSED AN IMMINENT THREAT

The defendants O'Hare and Pia incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009. This Court

should carefully consider the directions of the Supreme Court in Binette. The Court did not purport to announce an overarching universal principle. It expressly cautioned that the availability of access to a separate tort action under Binette should be analyzed on a case-by-case basis only, a caution duly repeated. Therefore, summary judgment should enter in favor of the officers on the state constitutional claims. On the other hand, even if the court were to find that such a claim was cognizable, it fails as there was no unreasonable seizure, since the officer's action of killing the dog was justified, as the dog posed an imminent threat.

E. THE PLAINTIFFS' TRESPASS CLAIM FAILS AS THE OFFICERS WERE PERFORMING OFFICIAL DUTIES AND THEREFORE LICENSEES

The defendants O'Hare and Pia incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009. In the present case, the officers were in the course of performing their official duties, and were therefore not trespassers but licensees. Accordingly, the plaintiffs' trespass claim fails as a matter of law and summary judgment should enter in their favor.

F. THE CONVERSION CLAIM FAILS AS THE OFFICERS DID NOT EXERCISE AN UNAUTHORIZED DOMINION OVER THE DOG GIVEN THAT THEIR ACTIONS WERE JUSTIFIED

The defendants O'Hare and Pia incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009. In the

present case, the officers did not exercise an unauthorized dominion over the dog as their actions were justified. O'Hare's actions were not "unauthorized." O'Hare was justified in shooting the dog as it posed an imminent threat to him. Accordingly, the conversion claim fails as a matter of law and summary judgment should enter in favor of the officers.

G. CONCLUSION

As indicated above: (1) the entry into the property was not a Fourth Amendment search; (2) the killing of the dog was not an unreasonable seizure search, as the dog posed an imminent threat to the officers; (3) the officers are entitled to qualified immunity for the entry into the property and the killing of the dog; (4) the plaintiffs fail to plead a viable claim under the Connecticut Constitution; (5) the officers did not trespass onto the property as they were licensees; and (6) the conversion claim fails, as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified. For these reasons, the plaintiffs' Motion for Partial Summary Judgment should be denied.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on August 31, 2009, a copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	SEPTEMBER 1, 2009

MOTION TO WITHDRAW MEMORANDUM

The defendants, Johnmichael O'Hare and Anthony Pia, hereby move to withdraw their memorandum entitled "Memorandum In Opposition To Plaintiff's Motion For Partial Summary Judgment Dated August 10, 2009", Document Number 51, which was erroneously e-filed with the court on August 31, 2009 as Document Number 52 and entitled "Motion to Withdraw".

Wherefore, the undersigned defendants hereby request that Document Number 51, entitled "Memorandum In Opposition To Plaintiff's Motion For Partial Summary Judgment Dated August 10, 2009", be withdrawn from the court docket.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on September 1, 2009, a copy of the foregoing MOTION TO WITHDRAW MEMORANDUM was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 31, 2009

**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT DATED AUGUST 10, 2009**

The defendants, O'Hare and Pia, incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009 in response to the plaintiffs' Motion for Partial Summary Judgment. The defendants further state: (1) the entry into the property was not a Fourth Amendment search; (2) the killing of the dog was not an unreasonable seizure search, as the dog posed an imminent threat to the officers; (3) the officers are entitled to qualified immunity for the entry into the property and the killing of the dog; (4) the plaintiffs fail to plead a viable claim under the Connecticut Constitution; (5) the officers did not trespass onto the property as they were licensees; and (6) the conversion claim fails, as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified.

A. THE OFFICERS' ENTRY INTO THE PROPERTY WAS JUSTIFIED AS IT WAS NOT A FOURTH AMENDMENT SEARCH

The plaintiffs claim that they possessed a reasonable expectation of privacy in their yard as it constituted curtilage. (Pl. Br. at pp. 7-9). However, the area was not curtilage, as there was no reasonable expectation of privacy to the portion of the plaintiffs' yard the officers entered. (See, Defendants' Memorandum of Law in Support of Motion for Summary Judgment dated August 10, 2009 for applicable case law).

Here, the officers entered the front yard through the open gate and then walked along the right side of the house. Before entering the back yard they saw the dog, turned around and ran. This area of the yard was not enclosed, and the plaintiffs took no steps whatsoever to protect said area from entry or from view. Therefore, there was no reasonable expectation of privacy to the portion of the plaintiffs' yard the officers entered, so the officers' entry was not a Fourth Amendment search. (Def. Br. at pp. 6-7)

First, it is undisputed that the yard was not enclosed. There was no fence that enclosed the property, and in fact, the front gate to the chain link fence was left open. Along the edge of the front yard of the property was an approximate 4 foot high chain link fence with multiple openings. The chain link fence had a large opening where the driveway was located. There was also a gate in the chain link fence leading to the front door, which was left open. (Def. Br. at p. 7); (Pl. Stat. of Facts, p. 2, ¶ 11)

Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard. Furthermore, there was a portion of fencing on the side of the property that was knocked down. Finally, there was no fence or barrier

separating the front yard from the backyard. Therefore, it is undisputed that the property was not enclosed. (Def. Br. at pp. 7-8); (Pl. Stat. of Facts, p. 2, ¶ 10)

Furthermore, the plaintiffs took no steps to protect their property from entry or from view. Neither the front yard nor back yard was enclosed by fencing or some other barrier. There was a large opening in the front fence where the driveway was located, and the front gate was left open. There was also no fencing or other barrier separating the front yard from the back yard. Therefore, anyone could simply walk from the street through the driveway opening, or open front gate, into the front yard and then access the back yard along either side of the residence. (Def. Br. at p. 8)

Finally, there was no stockade or similar type fencing in the front yard blocking ones view. There was merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no “No trespassing” signs or anything to that effect to keep people out of the property. (Def. Br. at p. 8)

Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private. Kirchoff, 156 Vt. at 10.

While the plaintiff claims that he erected a “Beware of Dog” sign on his house (Pl. Br. at p. 7), this does not apprise a person that the area is private, but simply that a dog is present. While the plaintiffs claim that O'Hare observed this sign, they fail to inform the court that O'Hare testified that he knew there was a Beware of Dog sign *only* after he reviewed photographs of the scene (after litigation was commenced), but specifically could not see said sign when they entered the property. (See, **Exhibit** SJ-2 at 69-70 to Plaintiff's Motion for Summary Judgment.) Furthermore, Pia unequivocally testified that at no time prior to entering the property did he observe the “Beware of Dog sign. (See,

Exhibit A, p. 71 to Defendants' Memorandum of Law in Support of Motion for Summary Judgment)

Moreover, there are many other cases, involving similar circumstances to the present case, where the court found that the area accessed by the police did not constitute curtilage. See, U.S. v. Hayes, 551 F.3d 138, (2d Cir. 2008) (Path taken by police canine to east of house and through backyard to sniff scrub brush located 65 feet from back door of house and on border of neighbor's property, which revealed black bag containing narcotics in brush, did not invade the curtilage of the home for Fourth Amendment purposes; there was an alternative path to backyard along driveway in full view of street which was plainly outside curtilage, narcotic smell was so strong it could be smelled from 65 feet away, and if canine had taken alternate path he would have led officer to bag); Simko v. Town of Highlands, 276 Fed.Appx. 39, 2008 WL 1925143 C.A.2 (N.Y.), May 01, 2008 (Court held that trees, bushes, and stumps around property did not significantly limit access or visibility and therefore area was not within curtilage of property); United States v. Reyes, 283 F.3d 446, 466-67 (2d Cir.2002) (no "search" where officers enter a driveway across which a chain was hung); United States v. Williams, 219 F.Supp.2d 346, 360 (W.D.N.Y.2002) (no expectation of privacy in driveway exposed to public); United States v. Hogan, 122 F.Supp.2d 358 (E.D.N.Y.2000) (yard in close proximity to house not part of curtilage where it is exposed to public view and no evidence that intimate activities associated with domestic life occurred there); State v. Hall, 719 A.2d 435 (Vt.,1998) (Officer was not within curtilage of defendant's house when officer viewed marijuana plant from wooded area behind house. Officer was standing five to ten feet from lawn in area just inside woods;

only fencing behind defendant's house was ornamental, area where officer stood as well as where marijuana was located was beyond fence, there was no evidence that area was used for activities such as picnics, barbecues or other "privacies of life," and defendant had not erected any fences or walls that would obstruct view of yard.)

Clearly, the facts in the present case do not support a conclusion that the area of the plaintiffs' yard where the officers entered was curtilage. The officers entered the front yard through the open gate and then walked along the right side of the house. Before entering the back yard they saw the dog, turned around and ran. The area of the yard they entered was not enclosed and the plaintiffs took no steps whatsoever to protect said area from entry or view. Accordingly, the area was not "curtilage" and the plaintiffs did not have a reasonable expectation of privacy to said area. Therefore, the officers' entry was not a Fourth Amendment search and summary judgment should enter in favor of the officers on the plaintiffs' Fourth Amendment claim.

B. THE KILLING OF THE DOG WAS NOT AN UNREASONABLE SEIZURE, AS THE DOG POSED AN IMMINENT THREAT TO THE OFFICERS

The plaintiffs claim that the officers illegally seized their property by shooting and killing the dog. (Pl. Br. at pp. 15-17) However, the killing of the dog was not an unreasonable seizure, as the dog posed an imminent threat. (See, Defendants' Memorandum of Law In Support of Motion for Summary Judgment dated August 10, 2009 for applicable law).

At the same time the officers observed the large dog, the dog looked in their direction and began to growl and charge at them. As the officers were running, the

large dog was growling, snapping and lunging at O'Hare. The dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner. (Def. Br. at p. 11)

When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog. The dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. The dog continued to gain on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. Even if he had gotten out the driveway, O'Hare believed that the dog would have continued to chase him. Therefore, it is undisputed that the dog posed an imminent threat. After making every effort to outrun the dog and get the dog to stop by yelling get back, O'Hare was left with no other choice than to shoot the dog as he believed that it was about to attack him. (Def. Br. at p. 11)

Officer O'Hare claims he discharged three rapid succession shots into the dog stopping it instantly. However, the minor plaintiff claims that O'Hare paused between his second and third shots, and did not shoot for a third time until after she called out, "don't shoot my dog." Even under the minor plaintiff's version that the dog had been shot twice, before she called out "don't shoot my dog", did not diminish the threat posed by the dog to the officer. (Def. Br. at p. 12)

Moreover, the plaintiff wrongfully claims that O'Hare and Pia were aware that dogs might be present on the property. (Pl. Br. at p. 16) First, Pia unequivocally testified that at no time prior to entering the property did he observe the "Beware of Dog" sign. (See, **Exhibit A**, p. 71 to Defendants' Memorandum of Law in Support of Motion

for Summary Judgment) Also, O'Hare was unsure if he saw said sign prior to entering the property and claimed that he was aware of the sign *only after* reviewing photographs of the residence after litigation commenced. (See, **Exhibit** SJ-2 at 69-70 to Plaintiff's Motion for Summary Judgment.)

Accordingly, Officer O'Hare made every effort to outrun and even stop the dog. However, after his attempts proved to be unsuccessful, and he observed the dog displaying threatening and aggressive behavior in his direction, he determined that the dog posed an imminent threat to him, and was left with no other choice than to shoot the dog. These facts are undisputed. Therefore, there was no unreasonable seizure, and summary judgment should enter in his favor as to the plaintiffs' Fourth Amendment claim.

C. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR THE ENTRY INTO THE PROPERTY AND THE KILLING OF THE DOG

At a minimum, the officers are entitled to qualified immunity for the entry into the property and killing of the dog. (See, Defendants' Memorandum of Law In Support of Motion for Summary Judgment dated August 10, 2009 for applicable law).

In the present case, it was objectively reasonable for the officers to believe that the plaintiffs' yard was not "curtilage" and their entry was not a Fourth Amendment search. First, it is undisputed that the yard was not enclosed. There were no fences that enclosed the property, and in fact, the front gate to the chain link fence was left open. Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard.

Also, the plaintiffs took no steps to protect their property from entry or view. Neither the front yard nor the back yard was enclosed by fencing or some other type of barrier, there was a large opening in the front fence where the driveway was located and the front gate was left open. There was also no fencing or barrier separating the front yard from the back yard. Therefore, anyone could simply walk from the street through the driveway opening, or open front gate, into the front yard and then access the back yard along either side of the house. Further, there was no stockade or similar type fencing in the front yard blocking ones view. There was merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no "No trespassing" signs or anything to that effect to keep people out of the property. Therefore, it was objectively reasonable for the officers to believe that the plaintiffs' yard was not "curtilage" and their entry was not a Fourth Amendment search.

It was also objectively reasonable for O'Hare to believe that the dog posed an imminent threat. It is undisputed that the dog chased O'Hare, he attempted to elude the dog, the dog closed in on him and that the dog was shot at close range. Therefore, it was objectively reasonable for O'Hare to view the dog as an imminent threat, which justified his use of deadly force.

D. THE PLAINTIFFS' CONNECTICUT CONSTITUTION CLAIM FAILS AS THEY HAVE FAILED TO PLEAD A RECOGNIZED CLAIM, AND EVEN IF THEY HAD, O'HARE'S ACTION OF KILLING THE DOG WAS JUSTIFIED, AS THE DOG POSED AN IMMINENT THREAT

The defendants O'Hare and Pia incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009. This Court

should carefully consider the directions of the Supreme Court in Binette. The Court did not purport to announce an overarching universal principle. It expressly cautioned that the availability of access to a separate tort action under Binette should be analyzed on a case-by-case basis only, a caution duly repeated. Therefore, summary judgment should enter in favor of the officers on the state constitutional claims. On the other hand, even if the court were to find that such a claim was cognizable, it fails as there was no unreasonable seizure, since the officer's action of killing the dog was justified, as the dog posed an imminent threat.

E. THE PLAINTIFFS' TRESPASS CLAIM FAILS AS THE OFFICERS WERE PERFORMING OFFICIAL DUTIES AND THEREFORE LICENSEES

The defendants O'Hare and Pia incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009. In the present case, the officers were in the course of performing their official duties, and were therefore not trespassers but licensees. Accordingly, the plaintiffs' trespass claim fails as a matter of law and summary judgment should enter in their favor.

F. THE CONVERSION CLAIM FAILS AS THE OFFICERS DID NOT EXERCISE AN UNAUTHORIZED DOMINION OVER THE DOG GIVEN THAT THEIR ACTIONS WERE JUSTIFIED

The defendants O'Hare and Pia incorporate by reference their Motion for Summary Judgment, Statement of Material Facts Not In Dispute and Memorandum of Law in Support of Motion for Summary Judgment all dated August 10, 2009. In the

present case, the officers did not exercise an unauthorized dominion over the dog as their actions were justified. O'Hare's actions were not "unauthorized." O'Hare was justified in shooting the dog as it posed an imminent threat to him. Accordingly, the conversion claim fails as a matter of law and summary judgment should enter in favor of the officers.

G. CONCLUSION

As indicated above: (1) the entry into the property was not a Fourth Amendment search; (2) the killing of the dog was not an unreasonable seizure search, as the dog posed an imminent threat to the officers; (3) the officers are entitled to qualified immunity for the entry into the property and the killing of the dog; (4) the plaintiffs fail to plead a viable claim under the Connecticut Constitution; (5) the officers did not trespass onto the property as they were licensees; and (6) the conversion claim fails, as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified. For these reasons, the plaintiffs' Motion for Partial Summary Judgment should be denied.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on August 31, 2009, a copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	AUGUST 31, 2009

DEFENDANTS' RESPONSE TO PLAINTIFF'S LOCAL RULE 56(a)(1)
STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

The defendants, O'Hare and Pia, hereby respond to the plaintiff's Statement of Material Facts. Furthermore, the defendants, O'Hare and Pia, adopt and incorporate by reference their Statement of Material Facts Not In Dispute dated August 10, 2009.

1. Admitted.
2. Admitted.
3. Unknown.
4. Unknown.
5. Denied. By their own admission, see Plaintiffs' Statement of Material Facts in Support of Motion for Summary Judgment, ¶ 11. See *a/so*, Def. O'Hare' and Pia's Statement of Facts, dated August 10, 2009, ¶¶ 11-16.
6. Denied. By their own admission, see Plaintiffs' Statement of Material Facts in Support of Motion for Summary Judgment, ¶ 11. See *a/so*, Def. O'Hare' and Pia's Statement of Facts, dated August 10, 2009, ¶¶ 11-16.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.

11. Admitted.

12. Unknown.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Denied. It is admitted that neither O'Hare nor Pia considered Hemingway an "informant" for the Hartford Police Department. It is denied that they admitted that he was not a "reliable" informant. See, **Exhibits** SJ-2 at 22-23; SJ-3 at 25-26 to Plaintiff's Motion for Summary Judgment.

19. Admitted.

20. Admitted.

21. Admitted.

22. It is admitted that O'Hare did not see any vehicle in the backyard from the street. It is denied that he was unable to see the entire backyard from the street, as he could see pieces of the backyard from the street. See, **Exhibits** SJ-2 at 51-52 to Plaintiff's Motion for Summary Judgment.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

27. Unknown.

- 28. Admitted.
- 29. Admitted.
- 30. Admitted.
- 31. Admitted.
- 32. Admitted.
- 33. Admitted.
- 34. Admitted.
- 35. Admitted.
- 36. Admitted.
- 37. Admitted.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on August 31, 2009, a copy of the foregoing Defendants' Response to Plaintiffs' Statement of Material Facts Not in Dispute was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	SEPTEMBER 1, 2009

MOTION TO WITHDRAW MEMORANDUM

The defendants, Johnmichael O'Hare and Anthony Pia, hereby move to withdraw their memorandum entitled "Memorandum In Opposition To Plaintiff's Motion For Partial Summary Judgment Dated August 10, 2009", Document Number 51, which was erroneously e-filed with the court on August 31, 2009 as Document Number 52 and entitled "Motion to Withdraw".

Wherefore, the undersigned defendants hereby request that Document Number 51, entitled "Memorandum In Opposition To Plaintiff's Motion For Partial Summary Judgment Dated August 10, 2009", be withdrawn from the court docket.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on September 1, 2009, a copy of the foregoing MOTION TO WITHDRAW MEMORANDUM was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO.
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	3:08CV01644(RNC)
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	SEPTEMBER 10, 2009

**PLAINTIFF'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

The plaintiffs, Glen Harris, individually and on behalf of K.H., hereby submit this Reply to the Defendants' "Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment" dated August 31, 2009. *See*, Defs.' Opp'n to Pl.'s Motion for Summ. J. (hereinafter SJ-Defs' Opp'n). The plaintiffs incorporate all the arguments in their Motion for Partial Summary Judgment and accompanying memorandum (hereinafter "Aug. 10th Memorandum") and their Memorandum in Objection to Defendants' Motion for Summary Judgment (hereinafter "Aug. 31st Memorandum") as if fully set forth herein.

I. THE DEFENDANTS HAVE OFFERED NO LAW OR EVIDENCE TO CONTRADICT THE FACT THAT THE PLAINTIFFS' YARD CONSTITUTED CURTILAGE

The defendants rely primarily on their memorandum in support of their summary judgment, filed on August 10, 2009. In rehashing these arguments, the defendants not only fail to respond to the plaintiffs' legal analysis, but also fail to perform even the basic four factor curtilage analysis under *United States v. Dunn*, 480 U.S. 294 (1987). This alone should be enough reason to reject the defendants' arguments against the plaintiffs' summary judgment motion. Nevertheless, the plaintiff will address the claims as restated in the defendants' memorandum filed

August 31, 2009.

First, the defendants assert that the plaintiffs' yard was not "enclosed." Merriam-Webster's dictionary defines "enclose" as follows: "a (1) : to close in : surround (2) : to fence off (common land) for individual use; b : to hold in : confine." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/enclosed>. The defendants admit that there were fences or other barriers on all four sides of the plaintiffs' property. *See*, Defs.' Resp. To Pls.' Loc. R. 56(a)1 Statement of Material Facts Not in Dispute (hereinafter "Defs.' 56(a)2 Statement"), ¶¶ 7-11. Thus, the plaintiffs' property was clearly "fenced off" for individual use, in other words, the plaintiffs' property was enclosed because it was surrounded by fences.

Second, the defendants' claim that because they never actually entered the back yard, they did not go into an area of the yard that constituted curtilage, even though they admit that the defendant officers turned and ran when they "rounded the corner." Defs.' 56(a)2 Statement, ¶¶ 28, 30. Quibbling over whether the defendants actually set foot in the back yard is not material. As discussed in the plaintiffs' two previous memoranda, the entire yard surrounding the plaintiffs' home was curtilage, and as such the defendant officers could only enter the property as any other visitor might. The officers in this case clearly did not enter the property as a visitor would. Instead, they walked along the side of the house opposite the driveway with their firearms drawn. Defs.' 56(a)2 Statement, ¶¶ 23, 26. Therefore the defendants were already in an area that was private by the time they reached the rear corner of the house.

The defendants also assert that because they could see onto the property, and because there were no "No Trespassing" signs posted on the property, the plaintiffs' curtilage claim fails. Under this twisted logic, any yard without a "No Trespassing" sign is posted is considered an "open field" and its owner loses an expectation of privacy. In this case, the fact that the property

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

was surrounded by fences and that the plaintiff posted “Beware of Dog” signs clearly demonstrates that the plaintiffs had a reasonable expectation of privacy in the yard, and particularly in the back yard. A “Beware of Dog” sign is the equivalent of a “No Trespassing” sign because it warns persons to stay out of the yard. Thus, the defendants’ act of walking along the north side of the property to the back yard violated the Fourth Amendment whether or not they actually entered the back yard.

II. THE KILLING OF THE DOG WAS AN UNREASONABLE SEIZURE BECAUSE IT WAS A NATURAL AND FORESEEABLE CONSEQUENCE OF THE DEFENDANTS’ ILLEGAL ENTRY INTO THE PLAINTIFFS’ YARD

The defendants ignore the legal argument contained in Part IV.A.3 of the plaintiffs’ Aug.10th Memorandum, which explains why the defendants are liable for the death of the dog as a natural and foreseeable consequence of their illegal entry. As mentioned above, this alone should cause summary judgment to enter in favor of the plaintiffs. However, one additional argument by the defendants needs to be addressed.

The defendants claim that they were not aware that the plaintiffs had a dog on the property because they did not see the “Beware of Dog” signs. The plaintiffs asserted in their Local Rule 56(a)1 Statement, ¶ 4, that the plaintiff had posted “Beware of Dog” signs prior to December, 2006. The defendants responded to that paragraph with the response “Unknown.” Federal Rule of Civil Procedure 56(e)(2) places an affirmative duty on a party opposing summary judgment to set out specific facts supported by evidence which show a genuine issue of material fact. If the defendants fail to do this, the court may, in its discretion, accept the “unknown” fact as true. Thus, it is undisputed that the plaintiff had three “Beware of Dog” signs posted on his property in December, 2006. Even though the defendants cavalierly ignored these signs while on

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

the property, O'Hare Dep, Ex. SJ-2, p. 69 line 20 - p. 70 lines 2-3, the mere presence of the signs gave the defendants reason to believe that there could be a dog on the property. It is of no consequence that the defendants did not notice the sign, any more than if they could not read the sign due to literacy issues.

Therefore, the defendants should have anticipated the presence of a dog on the plaintiffs' property, and its death was a natural and foreseeable consequence of the defendants' illegal entry.

IV. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The plaintiffs rely on their arguments as stated in Part II.B.6 of their Aug. 31st Memorandum.

V. THE PLAINTIFFS' CONNECTICUT CONSTITUTION CLAIMS ARE EXPRESSLY ALLOWED UNDER *BINETTE V. SABO*.

The plaintiffs rely on their arguments as stated in Part IV.C of their Aug. 10th Memorandum and Part II.E of their Aug. 31st Memorandum.

VI. THE DEFENDANTS WERE NOT LICENSEES AND THEREFORE TRESPASSERS WHEN THEY ILLEGALLY ENTERED ONTO THE PLAINTIFFS' PROPERTY

The plaintiffs rely on their arguments as stated in Part IV.D of their Aug. 10th Memorandum and Part II.G of their Aug. 31st Memorandum.

VII. THE DEFENDANTS' ACTIONS IN KILLING THE DOG WERE NOT JUSTIFIED AND THEREFORE THEY COMMITTED THE TORT OF CONVERSION

The plaintiffs rely on their arguments as stated in Part IV.E of their Aug. 10th Memorandum and Part II.H of their Aug. 31st Memorandum.

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

CONCLUSION

For the foregoing reasons, as well as those stated in their Aug. 10th and Aug. 31st Memoranda, the plaintiffs request that summary judgment be granted in their favor on these issues.

THE PLAINTIFF—
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Summary Judgment\PltfsReply2DefOppn.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.
as Guardian for K.H., a minor child

v.

JOHNMICHAEL O'HARE,
ANTHONY PIA, and
CITY OF HARTFORD

NO.: 3:08CV01644-RNC

SEPTEMBER 10, 2009

REPLY TO PLAINTIFFS' OBJECTION TO DEFENDANTS' SUMMARY JUDGMENT

The plaintiffs' objection to the motion for summary judgment makes a multitude of unsupported claims of disputed fact as well as an abundance of irrelevant arguments in the hope that the sheer volume will cause the court to find an issue of fact and deny the motion for summary judgment. Therefore, O'HARE and PIA hereby reply to the objection to the motion for summary judgment and isolate all of the issues and undisputed facts in their simplest form.

I. PLAINTIFFS DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE AREA WHERE THE OFFICERS ENTERED OR THEIR BACKYARD

As a matter of law, the plaintiffs cannot establish all four elements of Dunn. They cannot show "enclosure of the property" or that they took steps "to protect the property or area from view." Dunn, at 301. Instead, they rely on speculation, unsupported assertions and artificial claims of factual disputes. It is undisputed that the officers merely entered the front yard and the yard adjacent to the right side of the house, and at no time entered the backyard. Therefore, the question is whether or not this area is curtilage. Clearly, it was not.

The following facts are undisputed: there was a chain link fence along the front of the yard; there was an open gate that led to the front door; on the right side of the residence where the officers traversed there was no fence or barrier blocking one's view of or path of travel into the backyard; the officers reached the back corner of the residence, stopped and never entered the backyard; they turned around, ran back towards the front of the house and rounded the corner of the front of the

house¹, and there was no “No Trespassing” sign anywhere on the property. Therefore, it is wholly irrelevant whether or not the backyard was “curtilage”, as the officers never entered the backyard.

The plaintiffs admit that there is no claim against the officers for entering this portion of the yard. (Pl. Obj. at p. 9) (“there is no claim about police impropriety in the front yard”) Furthermore, plaintiffs admit that there was no expectation of privacy in the portion of a home’s yard that is visible to and used by the public. (Pl. Obj. at p. 9) Therefore, the plaintiffs’ front yard did not have an expectation of privacy as it was visible to and used by the public.

Furthermore, the photographs clearly show that the portion of the yard to the right of the plaintiffs’ residence where the officers entered is also clearly visible by the public. (Def. Mot. Sum. Judge. **Exhibit D**, pp. 2-3, ¶¶ 18-19; Photographs 4a and 4b; **Exhibit E**, p. 2-3, ¶¶ 18-19; Photographs 4a and 4b). Therefore, since the officers only entered the front yard and the right side of the residence, and these areas were visible by the public, there was no expectation of privacy to these areas. Accordingly, there was no Fourth Amendment search.

On numerous occasions, the plaintiffs incorrectly claim that the entire property was enclosed by fencing or the rear wall of a garage. (Pl. Obj. at p. 10). This is wholly inaccurate. It is undisputed that there was an opening where the driveway was located. It is also undisputed that there was an open front gate. These undisputed facts wholly negate the assertion that the “entire” property was “enclosed”.

Furthermore, the plaintiffs’ argument that a “Beware of Dog” sign is the functional equivalent to a “No Trespassing” sign is a stretch of the imagination. A “Beware of Dog” sign merely informs public that there is a dog present on the property. In no way does it inform the public that they are not to enter the property. Most importantly, the plaintiff himself testified that he

¹ The Plaintiffs’ Reply Memorandum to the Defendants’ Objection to the Partial Motion for Summary Judgment dated September 10, 2009 claims that the officers admitted that they rounded the corner to the rear of the house. (Pl. Reply at p. 2) Clearly, the plaintiffs’ have not carefully read the defendants’ Statement of Facts. Said Statement of Facts clearly shows that the officers did not round the corner of the *back* of the house and enter the backyard, but instead, turned around, ran, and as they proceed back towards the front yard, rounded the *front corner* of the house. (Def. State of Facts ¶¶ 22-31) While the Defendants’ Statement is exceptionally clear, and does not require further explanation, it is apparent that the plaintiffs have failed to read said Statement carefully, and therefore, required this basic description. Again, this shows that the plaintiffs are making every effort to artificially “create” an issue of fact.

put the "Beware of Dog" signs merely so people would know that there were dogs there, and not to keep them off of his property. See, Exhibit 1, p. 47, lines 18-21.

Moreover, neither officer saw the sign prior to entering the property. While plaintiffs claim O'Hare observed this sign, they fail to inform the court that O'Hare testified that he knew there was a Beware of Dog sign *only* after he reviewed photographs of the scene (after litigation commenced), but specifically could not see said sign when they entered the property. (*See, Exhibit SJ-2* at 69-70 to Plaintiff's Motion for Summary Judgment.) Furthermore, Pia unequivocally testified that at no time prior to entering the property did he observe the "Beware of Dog sign. (*See, Exhibit A*, p. 71 to Defendants' Memorandum of Law in Support of Motion for Summary Judgment)

Even if the officers did enter the backyard, there was no Fourth Amendment search as the plaintiffs did not have a reasonable expectation of privacy in the backyard. Along the right side of the property there was a chain link fence. (Pl. Mot. For Part. Sum. Judge, Ex. SJ-5; SJ-7; SJ-8) Anyone standing in the backyard of the property to the right of 297 Enfield Street, could see into the backyard of 297 Enfield Street as there was no barrier, fence or other obstruction, blocking their view. (Pl. Mot. For Part. Sum. Judge, Ex. SJ-5; SJ-7; SJ-8). Therefore, there was no reasonable expectation of privacy in the plaintiffs' backyard.

II. KILLING OF DOG WAS JUSTIFIED AS IT POSED AN IMMINENT THREAT

Once again the plaintiffs make unsupported claims of disputed fact. The plaintiffs argue that there is an issue of fact as to whether or not the dog was acting aggressively. (Pl. Obj. at pp. 12-13) However, there is no factual support for this argument and the plaintiff relies solely on mere allegation and speculation, and a general statement that their dog was good tempered. It is undisputed that neither the plaintiff nor his daughter observed any of the dog's actions between the time the officers turned and ran and the time of the second shot. Therefore, they have no basis whatsoever to dispute any of the facts alleged by the officers detailing the dog's actions during this time. Furthermore, both officers clearly and unequivocally indicate that the dog was acting in a very aggressive manner in that it was lunging, snapping and growling at them.

The plaintiffs' abstract claim that their dog was "good-natured and obedient and did not bite anyone" does not create an issue of fact, as to what the dog's actions were between the time the officers ran and the time of the second shot. (Pl. Obj. at pp. 12-14) The plaintiffs' subjective beliefs as to their dog's temperament are wholly irrelevant in this regard. Instead, the plaintiffs are attempting to "create" a factual dispute with no support in the record in the hope that merely alleging a factual dispute will cause the court to deny the defendants' summary judgment.

Next, the plaintiff tries to convince the court that since the dog was not a pit bull it did not pose an imminent threat to O'Hare. (Pl. Obj. at pp. 12-14) However, the plaintiffs clearly misunderstand the appropriate legal analysis. While a "pit pull" *might be* an *example* of an aggressive dog that *could* pose an imminent threat, the breed of the dog is by no means the determining factor of whether or not in a given set of circumstances, a dog posed an imminent threat. The appropriate legal analysis is, "did the dog pose an imminent threat." See, Altman v. City of High Point, 330 F.3d 194, 205, 206 (4th Cir.2003). It is a case by case analysis, and in the present case, it is undisputed that the dog posed an imminent threat to O'Hare.

Finally, the plaintiffs attempt to parse out the shots and claim that the third shot was not justified. (Pl. Obj. at p. 14) In support of this argument, the plaintiffs submit a Necropsy report *never previously disclosed* to the defendants, which indicates that the third shot was the fatal shot. (Pl. Obj. at p. 14); (Pl. Obj. Ex. SJ-20). First, said report should be stricken as it was never disclosed to the defendants, the plaintiffs never disclosed Kathleen Deering as an expert witness, and the deadline for all discovery has long since passed. Second, the plaintiffs again misunderstand the appropriate legal analysis. The question is, "did the dog pose an imminent threat." If it did, the officer was justified in using deadly force. Once the need for the use of deadly force was justified, the officer had the right to use deadly force, and the analysis ends. The plaintiffs have conceded that the dog was not dead after the first two shots which certainly justified the third shot. There is no requirement under the Fourth Amendment that a police officer stop and assess between shots.

At a minimum, the officers are entitled to qualified immunity for entering the property and killing the dog. First, it was objectively reasonable for the officers to believe that plaintiffs did not have a reasonable expectation of privacy in the area of the plaintiffs' yard they entered. The following facts are undisputed: there was an approximate four foot chain link fence along the front of the yard; there was an opening in the chain link fence where the driveway is located; the front gate leading up to the front entrance was open; the front yard was clearly visible from the street; the right side of the residence where the officers traversed is visible from the street and does not contain any fence or barrier blocking one's view or path or travel to the backyard; there was no "No trespassing" sign anywhere on the property, but instead a "Beware of Dog" sign informing people that a dog was present; and the officers never entered the backyard, but instead stopped at the corner, saw the dog, turned and ran. Therefore, it was objectively reasonable for the officers to believe the plaintiffs did not have an expectation of privacy in the area of the yard they entered.

O'Hare is also entitled to qualified immunity for the killing of the dog, as it was objectively reasonable for him to believe the dog posed an imminent threat. Again, the following facts are undisputed: at no time between the time the officers turned and ran between the time of the second shot did the plaintiff, the plaintiff's daughter or any other persons, aside from the two officers, witness the dog's actions; the dog continued to growl, bark, snap and lunge at the officers; and after an attempt to stop the dog by yelling "get back" numerous times by O'Hare, the dog continued to advance towards Officer O'Hare again growling, snapping, lunging and snarling. Therefore, it was objectively reasonable for Officer O'Hare to believe that the dog posed an imminent threat.

Finally, even under the plaintiffs' argument that the third shot was not justified, the officers are still entitled to qualified immunity. Here, the appropriate legal analysis is, "did the dog pose an imminent threat." See, Altman v. City of High Point, 330 F.3d 194, 205, 206 (4th Cir.2003). If it did, the officer is justified in using deadly force. Here, it was objectively reasonable for O'Hare to believe that once the imminent threat was present, he was entitled to use deadly force. Moreover, it was not clearly established that the third shot, under the plaintiffs' version, was not justified.

III. THE OFFICERS' ACTIONS DID NOT SHOCK THE CONSCIENCE

The actions of the officers, even assuming the plaintiffs' version is true, do not "shock the conscience." While the plaintiff is attempting to parse out the factual circumstances in an effort to maintain as many claims as possible, the case law is quite clear that when one has an explicit source of protection for an alleged constitutional violation, the Fourteenth Amendment is not to be used. The plaintiffs allege that the first two shots are governed by the Fourth Amendment and the third shot is governed by the Fourteenth Amendment. (Pl. Obj. at p. 18) However, the plaintiffs' objection wholly negates this argument, as they go to extreme lengths to argue that the third shot violated the Fourth Amendment. (Pl. Obj. at pp. 12-18) Accordingly, the substantive due process claims are improper as there is an explicit textual source of protection for the alleged misconduct.

However, if the court were to allow plaintiffs to proceed under the Fourteenth Amendment, and assuming that the plaintiffs' version was true, the officers actions did not "shock the conscience." First, the plaintiffs again rely on the Necropsy Report, which should be stricken.. Even taking into consideration said report, the actions of O'Hare cannot be said to be "so brutal and offensive to human dignity" that it "shocks the conscience" of the court. See, Rochin v. California, 342 U.S. 165, 172, 174 (1952). At most, they were insensitive, ill-advised or "[o]rverzealous . . . government action . . . [that] does not give rise to a constitutional violation." Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir.1994).

Most importantly, there are many cases cited in the defendants' motion for summary judgment with factual circumstances much more egregious and outrageous than the factual circumstances presented by plaintiffs here, where the court found that those actions did not shock the conscience. (Def. Br. at pp. 19-20) Therefore, as a matter of law, the defendants' actions here, even assuming the plaintiffs' version were true, did not shock the conscience of the court. While they may have been insensitive or ill-advised at most, they did not rise to the level that they were so brutal and offensive to human dignity that they "shocked the conscience." It certainly cannot be

considered “conscience shocking” that the officer fired a third shot given that the dog had lunged, snapped and snarled at him and was still alive at the time of the third shot.

The factual basis supporting O’Hare’s decision to use deadly force is undisputed, and justified. Therefore, his decision to shoot the dog three times rather than two, is not conscience shocking. Even if his decision to shoot three times was conscience shocking, that fact was not clearly established under case law thereby entitling O’Hare to qualified immunity.

IV. PLAINTIFFS’ FAILURE TO INTERVENE CLAIM FAILS AS PIA DID NOT HAVE A REALISTIC OPPORTUNITY TO INTERVENE AND DID NOT REASONABLY BELIEVE PLAINTIFFS’ RIGHTS WERE BEING VIOLATED

Defendants incorporate by reference their argument on pages. 21-23 of their motion for summary judgment.

V. PLAINTIFFS’ CONNECTICUT CONSTITUTION CLAIM FAILS AS THEY FAILED TO PLEAD A RECOGNIZED CLAIM, AND EVEN IF THEY HAD O’HARE’S ACTIONS OF KILLING THE DOG WAS JUSTIFIED

Clearly, the plaintiffs fail to fully comprehend Bivens, Binnette and the jurisprudence that flows from these cases. These cases and all subsequent cases clearly maintain that a cause of action under the Connecticut Constitution *is not* created in every single circumstance. (Def. Br. at pp. 23-29) Instead, it is a case-by-case analysis and depends upon a multitude of factors. (Def. Br. at pp. 23-29) However, the plaintiff wholly fails to consider and analyze these factors as they pertain to the present case. On the other hand, the defendants clearly and comprehensively analyze these factors, which show that there should be no such cause of action in the present case. (Def. Br. at pp. 23-29) Furthermore, even if there was such a cause of action under the Connecticut Constitution, said claim would fail, as the entry into the property was not a Fourth Amendment “search”, and the killing of the dog was justified. (Def. Br. at p. 28) Furthermore, at a minimum the officers would be entitled to qualified immunity for their actions of entering the property and killing of the dog.

VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM FAILS AS THERE IS NO RIGHT TO SUE FOR EMOTIONAL DISTRESS RESULTING FROM THE DEATH OF A PET, AND THE OFFICER'S ACTIONS WERE NOT EXTREME AND OUTRAGEOUS

The plaintiffs wholly ignore the defendants' argument and supporting case law that Connecticut does not allow a plaintiff to recover for negligent or intentional infliction of emotional distress, resulting from the death of a pet. Since the plaintiffs fail to address this argument and the supporting case law, they acquiesce to the defendants' argument in this respect. Accordingly, summary judgment should enter on the intentional infliction of emotional distress claim, as Connecticut does not recognize such a claim based upon the death of a pet.

Moreover, even if there were such a claim in the State of Connecticut, the officer's actions were not extreme and outrageous. It is undisputed that Officer O'Hare made every effort to outrun and even stop the dog. It is also undisputed that the dog continued to growl, snap and lunge at Officer O'Hare. It is further undisputed that the dog posed an imminent harm to Officer O'Hare and therefore he was justified in using deadly force. Finally, under the circumstances, his decision to fire three times instead of two was not as a matter of law "beyond the bounds of civilized society", "atrocious" or "utterly intolerable." Therefore, summary judgment should enter in favor of the officers on the claim for intentional infliction of emotional distress.

VII. PLAINTIFFS' TRESPASS CLAIM FAILS AS THE OFFICERS WERE PERFORMING OFFICIAL DUTIES AND THEREFORE LICENSEES

The plaintiffs' brief provides no supporting statutory law, case law or citations to the record in support of their argument that the officers were trespassers. On the other hand, it is undisputed that the officers were acting in the course of their official duties at the time of the incident. (Def. Br. at pp. 32-33) Also, there is an abundance of case law that maintains that a police officer who makes such an entry onto private property in the course of performing his official duties is not a trespasser but a licensee. (Def. Br. at pp. 32-33) However, the plaintiff has provided no statutory or case law showing that an entry onto private property by a police officer in the course of performing

his official duty is a trespasser and not a licensee. Furthermore, the plaintiff has failed to cite to any evidence in the record showing that the officers *were not* performing their official police duties. Therefore, since it is undisputed that the officers were in the course of performing their official duties at the time of the incident, they were not trespassers but licensees. Accordingly, summary judgment should enter in favor of the officers on the trespass claim.

VIII. CONVERSION CLAIM FAILS AS OFFICERS DID NOT EXERCISE AUTHORIZED DOMINION OVER DOG, AS THEIR ACTIONS WERE JUSTIFIED

Once again, the plaintiffs offer no statutory or case law in support of their objection as to the conversion claim. Instead, they provide the court with mere conclusory allegations unsupported by any case law, statutory law or citations to the record. On the other hand, it is undisputed that between the time the officers turned around and ran and the time of the second shot the dog was lunging, snapping and snarling at O'Hare. It is also undisputed that after a brief hesitation, the dog continued to lunge, snap and snarl at O'Hare. Therefore, it is undisputed that the dog posed O'Hare an imminent harm. Accordingly, he was justified in using deadly force, and as a matter of law, O'Hare did not exercise an unauthorized dominion over the dog since his actions were justified.

IX. THE OFFICERS ARE ENTITLED TO GOVERNMENTAL IMMUNITY ON THE PLAINTIFFS' NEGLIGENCE CLAIMS

First, O'Hare did not act with malice, wantonness and an intent to injure when he shot the dog, as the dog posed an imminent. It is undisputed that between the time the officers began to run and the time of the second shot, the dog was growling, snapping and lunging at O'Hare. Aside from mere speculation, the plaintiffs have no evidence to contradict this. Furthermore, it is undisputed that after a brief hesitation, the dog once again pursued O'Hare by again lunging, snapping and growling at him. Therefore, it is undisputed that the dog posed an imminent threat. At the point that the dog posed an imminent threat, he was justified in using deadly force. Therefore, his actions can hardly be said to be malicious, wanton or intentional. Furthermore, any intentional acts would negate liability against the Town. See, C.G.S. § 52-557n(a)(2)(A).

In order to qualify for the identifiable victims' exceptions plaintiff must show: (1) that she was an identifiable victim or a foreseeable class of victims; (2) that there was an imminent harm; and (3) that the imminent harm was apparent to the municipal officer. (Def. Br. at pp. 36-37) In the present case, the plaintiffs cannot show that there was any imminent harm. Imminent is defined as about to occur and pending and ready to take place. (Def. Br. at pp. 37-38) In the instant matter, the alleged harm, namely observing the dog being shot implicates a wide range of factors which could have occurred at an unspecified time in the future or not at all. For example, the dog could have been inside, the officers could have gotten a better start and outran the dog, the minor plaintiff could have stopped the dog, the dog could have been on a leash, or the minor plaintiff could have been present inside the home and not witnessed the shooting at all. Therefore, the alleged harm can hardly be said to be imminent, as it was not about to occur, ready to take place, or near at hand. Instead, it implicated a wide range of factors which could have occurred at any time, if at all.

Furthermore, at the time the officers entered the property they had no idea that there was a dog in the backyard, let alone that it would violently and aggressively chase them. Therefore, it was not apparent to O'Hare that defending himself from the attack of the dog would cause an extreme emotional disturbance in the girl, and in any event it was justified.

X. THE OFFICERS' ACTIONS WERE NOT RECKLESS AS A MATTER LAW

The plaintiffs' objection sets forth arguments unsupported by any factual basis in the record. Said argument is based solely upon speculation and an artificially "created" factual scenario, again with no factual support in the record. However, it is undisputed that the officers entered a portion of the plaintiffs' property to which the plaintiffs did not have a reasonable expectation of privacy, and encountered a dog that posed them an imminent threat. Therefore, the officers' entry into the property was not a Fourth Amendment "search" and the killing of the dog was justified, so their actions can hardly be called reckless.

Even assuming the plaintiffs' version is accurate, the officers' actions were justified under both Fourth Amendment and Substantive Due Process standards, and therefore their actions can

hardly be said to be “highly unreasonable conduct, involving an extreme departure from ordinary care.” Moreover, since the officers believed that their entry into the property and shooting of the dog was justified, they did not possess the “state of consciousness” to deem their actions reckless.

DEFENDANTS,
JOHNMICHAEL O’HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on September 10, 2009, a copy of the foregoing Reply to Plaintiffs' Objection to Defendants' Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	SEPTEMBER 10, 2009

**DEFENDANTS' LOCAL RULE 56(a)(2) STATEMENT IN REPLY TO PLAINTIFFS'
OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The defendants, O'HARE and PIA, hereby reply to the plaintiffs' objection to the motion for summary judgment and isolate all of the undisputed facts in their simplest form. The following material facts are undisputed:

1. There was an approximate four-foot chain link fence in the front yard of 297 Enfield Street on the date of the incident. (Pl. Stat. of Facts in Obj. at p. 3, ¶ 11); (Def. Stat. of Facts at p. 2, ¶ 11)
2. There is an opening in the chain link fence where the driveway is located. (Pl. Stat. of Facts in Obj. at p. 4, ¶ 12); (Def. Stat. of Facts at p. 3, ¶ 12)
3. In the chain link fence there is a gate leading up to the front entrance of the door. (Pl. Stat. of Facts in Obj. at p. 4, ¶ 13); (Def. Stat. of Facts at p. 3, ¶ 13)
4. On the date of the incident the gate leading up to the front entrance of the door was open. (Pl. Stat. of Facts in Obj. at p. 4, ¶ 13); (Def. Stat. of Facts at p. 3, ¶ 13) By their own admissions, the plaintiffs have no knowledge as to whether or not this gate was open on that date. (Pl. Stat. of Facts in Obj. at p. 4, ¶ 13) However, in opposition, both officers clearly maintain that the gate was open on the date of the incident. (Def. Stat. of Facts at p. 3, ¶ 13) Therefore, there is no issue of material fact as to whether or not the gate was open.

5. The officers entered the front yard through the open gate. (Pl. Stat. of Facts in Obj. at p. 5, ¶ 18); (Def. Stat. of Facts at p. 3, ¶ 18)

6. The officers then proceeded around the right side of the residence. (Pl. Stat. of Facts in Obj. at p. 5, ¶ 19); (Def. Stat. of Facts at p. 4, ¶ 19)

7. There is no fence or other barrier on the right side of the residence blocking one's view of or path of travel to the backyard. (Pl. Stat. of Facts in Obj. at p. 4, ¶ 14; p. 4, ¶ 16); (Def. Stat. of Facts at p. 3, ¶ 16); *see also* (Def. Mot. Sum. Judge. **Exhibit D**, pp. 2-3, ¶¶ 18-19; Photographs 4a and 4b; **Exhibit E**, p. 2-3, ¶¶ 18-19; Photographs 4a and 4b)

8. There was no "No Trespassing" sign anywhere on the property. (Pl. Stat. of Facts in Obj. at p. 5, ¶ 17); (Def. Stat. of Facts at p. 3, ¶ 17)

9. The plaintiff, Glenn Harris, testified that he put the "Beware of Dog" signs up so people would know that there were dogs there. See, Deposition of Glenn Harris, attached as **Exhibit 1**, p. 47, lines 18-21.

10. Along the right side of the property there was a chain link fence. (Pl. Mot. For Part. Sum. Judge, Ex. SJ-5; SJ-7; SJ-8)

11. Anyone standing in the backyard of the property to the right of 297 Enfield Street, could see into the back yard of 297 Enfield Street as there was no barrier, fence or other obstruction, blocking their view. (Pl. Mot. For Part. Sum. Judge, Ex. SJ-5; SJ-7; SJ-8)

12. The officers reached the corner of house and stopped. (Pl. Stat. of Facts in Obj. at p. 5, ¶ 22); (Def. Stat. of Facts at p. 4, ¶ 20; p. 5, ¶ 27)

13. Neither officer rounded the corner and entered the backyard of 297 Enfield Street. (Def. Stat. of Facts at p. 5, ¶ 27) However, without any factual support in the record, the plaintiff claims that this is untrue. In support of this argument the plaintiff cites *solely* to page 55 of

Officer O'Hare's deposition transcript. (Pl. Stat. of Facts in Obj. at p. 6, ¶ 27) However, nowhere on page 55 of O'Hare's deposition transcript does he testify that he rounded the corner and entered the backyard. (Pl. Part. Sum. Judge. Ex. SJ-2, p. 55) In fact, page 55 actually shows that O'Hare *did not* round the corner and enter the backyard. (Pl. Part. Sum. Judge. Ex. SJ-2, p. 55) This is the only evidence in the record the plaintiffs cite to in support of their allegation that O'Hare rounded the corner. (Pl. Stat. of Facts in Obj. at p. 6, ¶ 27) Furthermore, the plaintiff does not allege that Pia rounded the corner, as it is undisputed that he did not. (Pl. Stat. of Facts in Obj. at p. 6, ¶ 27); (Def. Stat. of Facts at p. 5, ¶ 27) As indicated above, the plaintiffs are merely making an unsupported allegation of a factual dispute. However, it is undisputed that at no time did either officer round the corner and enter the backyard.

14. The two officers observed the plaintiff's dog which began to run in their direction. (Pl. Stat. of Facts in Obj. at p. 6, ¶ 24); (Def. Stat. of Facts at p. 4, ¶ 24)

15. The minor plaintiff testified that she was outside in the backyard with her dog "Seven" when "Seven" bolted around to the front. (Def. Mot. Sum. Judge. **Exhibit D**, p. 15, lines 3-10)

16. The two officers turned around and proceeded to run back in the direction they entered the property. (Pl. Stat. of Facts in Obj. at p. 6, ¶ 26); (Def. Stat. of Facts at p. 4, ¶ 26)

17. At no time between the time the officers began to run to the time of the second gun shot did the plaintiff, his minor daughter or any other person, aside from the two officers, witness what transpired between the dog and the officers. See, **Exhibit 1**, p. 51, lines 11-15; p. 63, lines 23-24; p. 66, lines 7-14; *Deposition of K.H.*, attached as **Exhibit 2**, p. 26, lines 10-25; p. 27, lines 1-25; p. 28, lines 1-25; p. 29, line 1. While the plaintiff has made some mere allegations of a good tempered dog, this does not create an issue of fact as to what the dog's

actions were from the time the two officers began to run up until the time of the second shot. (Pl. Part. Sum. Judge. Ex. SJ-9) Again, the plaintiff is merely making an unsupported allegation of a factual dispute. During this time, aside from the two officers, no one was present and no one observed the actions of the dog. Therefore, there is no evidence to contradict Pia's and Officer O'Hare's descriptions of the dog's actions.

18. The plaintiff, Glenn Harris, testified that no matter who came onto their property, "Seven" would run towards them, and might bark as well. See, Exhibit 1, p. 70, lines 1-20.

19. As the officers were running back towards the front of the residence and the dog was chasing them, the dog was growling, snapping and lunging at O'Hare. (Def. Stat. of Facts at p. 5, ¶ 28) Again, at no time between the time the officers began to run to the time of the second gun shot did the plaintiff, his minor daughter or any other person, aside from the two officers, witness what transpired between the dog and the officers. While the plaintiff has made some mere allegations of a good tempered dog, this does not create an issue of fact as to what the dog's actions were from the time the two officers began to run up until the time of the second shot. (Pl. Part. Sum. Judge. Ex. SJ-9)

20. Officer Pia successfully ran out the front gate, the opening where the driveway is located through the front yard. (Pl. Stat. of Facts in Obj. at pp. 6-7, ¶ 29); (Def. Stat. of Facts at p. 5, ¶ 29)

21. Officer O'Hare turned around and yelled, "get back" numerous times, which caused the dog to momentarily pause. (Pl. Stat. of Facts in Obj. at p. 7, ¶ 31); (Def. Stat. of Facts at p. 5, ¶ 31)

22. The dog then proceeded once again to lunge, snap and growl at O'Hare. (Pl. Stat. of Facts in Obj. at p. 7, ¶ 32); (Def. Stat. of Facts at p. 5, ¶ 32) Again, at no time between the

time the officers began to run to the time of the second gun shot did the plaintiff, his minor daughter or any other person, aside from the two officers, witness what transpired between the dog and the officers. While the plaintiff has made some mere allegations of a good tempered dog, this does not create an issue of fact as to what the dog's actions were from the time the two officers began to run up until the time of the second shot. (Pl. Part. Sum. Judge. Ex. SJ-9)

23. When the dog was in close proximity to O'Hare, he fired three shots downward into the dog. (Pl. Stat. of Facts in Obj. at p. 8, ¶¶ 36-37); (Def. Stat. of Facts at p. 6, ¶¶ 36-37) Again, at no time between the time the officers began to run to the time of the second gun shot did the plaintiff, his minor daughter or any other person, aside from the two officers, witness what transpired between the dog and the officers. While the plaintiff has made some mere allegations of a good tempered dog, this does not create an issue of fact as to what the dog's actions were from the time the two officers began to run up until the time of the second shot. (Pl. Part. Sum. Judge. Ex. SJ-9)

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
Ct
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on September 10, 2009, a copy of the foregoing Statement of Facts in Reply to Plaintiffs' Objection to Motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
Alan R. Dembiczak

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----- X
:
GLEN HARRIS, Individually and PPA as :
Guardian for K.H., a minor child, :
Plaintiffs, : Civil Action No.
:
vs. : 3:08CV01644-RNC
:
JOHNMICHAEL O'HARE, ANTHONY PIA, :
AND CITY OF HARTFORD, : MAY 6, 2009
Defendants. :
:
----- X

DEPOSITION OF GLEN HARRIS

APPEARANCES:

JON L. SCHOENHORN & ASSOCIATES, LLC
Attorneys for the Plaintiffs
108 Oak Street
Hartford, Connecticut 06106-1514
(860) 278-3500
BY: JON L. SCHOENHORN, ESQUIRE
SARA PACKMAN, ESQUIRE

HOWD & LUDORF, LLC
Attorneys for the Defendants
65 Wethersfield Avenue
Hartford, Connecticut 06114-1190
(860) 249-1361
BY: THOMAS R. GERARDE, ESQUIRE

OFFICE OF THE CORPORATION COUNSEL
Attorneys for the City of Hartford
550 Main Street
Hartford, Connecticut 06103
(860) 757-9700
BY: NATHALIE FEOLA-GUERRIERI, ESQUIRE
Assistant Corporation Counsel

ALSO PRESENT: K.H., Plaintiff

NICOLE M. GOSSELIN, R.P.R.
CONNECTICUT LICENSE NUMBER: 00084

1 A There's one there, in the back of the house.

2 Q All right. So now there's more than one?

3 A Yes, there's one on the front of the house right
4 there as well.

5 Q Okay. So photograph H is your front door, and
6 to the left of your front door is a sign that says, "Beware
7 of Dog"; is that right?

8 A Yes.

9 Q All right. And now you've pointed to which one,
10 sir?

11 A M.

12 Q Photograph M is the door?

13 A Back porch door.

14 Q Back porch door. And to the left as you look at
15 that photograph of the door is another "Beware of Dog"
16 sign?

17 A Yes.

18 Q Who put those signs up?

19 A I did.

20 Q And why did you put them up?

21 A So people would know there were dogs there.

22 Q Do you believe that if someone walked into your
23 home and they were a stranger, that the dogs would attack
24 them?

25 A Depending on how we responded to the person.

1 Q And so the rule is before you get home, if one
2 of the dogs is out, be out there with them?

3 A Yes.

4 Q But it was okay to let the dog out in the
5 afternoon?

6 A Yes.

7 Q What about on a leash for a walk, was that
8 permitted, or was that wait until you get home?

9 A That was wait until I get home, wait until
10 you're homework's done, more likely.

11 Q Now, I take it you were not home on December 20,
12 2006 when the police came to your home?

13 A No, I wasn't.

14 Q You were at work that day, sir?

15 A Yes.

16 Q And when did you first hear that something had
17 happened involving police and one of your dogs at your
18 home?

19 A It was sometime after three p.m.

20 Q Did you receive a phone call from someone?

21 A Yes.

22 Q Who that was?

23 A Tashonna.

24 Q What did she say?

25 A It was hard to make out because all I heard was

1 Q And when was it that you spoke to her to learn
2 that information? Did you get that from the first
3 conversation or a second? Or some other time? Sorry.

4 A I'm not certain. I'm not certain.

5 Q Did she tell you whether she had any interaction
6 with the police in terms of conversations?

7 A She told me she was yelling "Don't shoot my dog"
8 before he fired the last shot.

9 Q Did she tell you what the timing was between the
10 first shot -- Well, how many shots total did she tell you?

11 A Three shots.

12 Q Did she tell you about the timing between the
13 first shots?

14 A First two in succession. And the break before
15 the third shot.

16 Q How long a break?

17 A Enough time for her to ask them not to shoot my
18 dog.

19 Q Did she tell you where she was when the second
20 shot was fired?

21 A She was still approaching the front of the
22 house.

23 Q Did Tashonna see any of the shots fired?

24 A She didn't see any of the shots, no.

25 Q Not shot one, not shot two or not shot three?

1 A Yes.

2 Q Okay. And she told you she heard the shots?

3 A Yes.

4 Q Did she tell you she saw the shots?

5 A She didn't see the shots. But she heard them.

6 Q What did she tell you about the shots?

7 A She told me she heard a couple of the shots.

8 And when she heard the shots, she came -- I guess she was
9 in the kitchen or something of that nature. She was some
10 point and when she heard the shots, she proceeded to come
11 toward the front of the house.

12 She didn't see the third shot either, but by the
13 time she got outside, the dog was already dead and K was
14 already hysterical.

15 Q I think we have her name from one of the police
16 reports, so I know who you're talking about. I just want
17 to make sure that it's the same person. Is it Jonna Van
18 Allen?

19 A That may be.

20 Q African-American female, about twenty-seven
21 years old as of then? 3/19/79? Lives at 300 Enfield
22 Street, does that sound right?

23 A Right -- No, 300 would be the person who lived
24 across the street.

25 Q Right.

1 Q Okay. Based on what you know about Seven, if
2 there were police officers that Seven saw on your property,
3 would you expect him to run towards them?

4 MR. SCHOENHORN: Object to the form.

5 Q Because they were strangers and they were in
6 uniform?

7 MR. SCHOENHORN: Object to the form.

8 A No matter who come to the property, they run to
9 him.

10 BY MR. GERARDE:

11 Q I missed the last part of that?

12 A No matter who came up to the property, he would
13 run toward them.

14 Q Okay. Because that's a dog and it was on his
15 property, and so that's what he would do?

16 A He always had it in his mind, all the time, to
17 play. So anybody who came in the yard must be time to
18 play.

19 Q Are you saying that he wouldn't bark?

20 A He might bark. He might not.

21 Q Are you saying that he would not act like a
22 watchdog and run someone off your property?

23 A If I came into the yard, he will run and jump on
24 me.

25 Q Okay. That's understandable.

1 STATE OF CONNECTICUT :

2 ss.


3 COUNTY OF HARTFORD :

4
5 I, Nicole M. Gosselin, R.P.R., a Notary
6 Public for the state of Connecticut, do hereby certify that
7 the deposition of GLEN HARRIS, was taken before me pursuant
8 to the Federal Rules of Civil Procedure, at the offices of
9 Howd & Ludorf, LLC, 65 Wethersfield Avenue, Hartford,
10 Connecticut, commencing at 10:20 a.m., on Wednesday, May 6,
11 2009.

12 I further certify that the witness was first
13 sworn by me to tell the truth, the whole truth, and nothing
14 but the truth, and was examined by counsel, and his
15 testimony stenographically reported by me and subsequently
16 transcribed as hereinbefore appears.

17 I further certify that I am not related to
18 the parties hereto or their counsel, and that I am not in
19 any way interested in the event of said cause.

20 Dated at Hartford, Connecticut, the 27th day
21 of May, 2009.

22 
23 Nicole M. Gosselin, R.P.R.
24 Notary Public

24 My Commission Expires December 31, 2011
25

EXHIBIT 2

- - - - - X
 :
 GLEN HARRIS, Individually and PPA as :
 Guardian for K.H., a minor child, :
 Plaintiffs, : Civil Action No.
 :
 vs. : 3:08CV01644-RNC
 :
 JOHNMICHAEL O'HARE, ANTHONY PIA, :
 AND CITY OF HARTFORD, : MAY 6, 2009
 Defendants. :
 :
 - - - - - X

APPEARANCES:

JON L. SCHOENHORN & ASSOCIATES, LLC
Attorneys for the Plaintiffs
108 Oak Street
Hartford, Connecticut 06106-1514
(860) 278-3500
BY: JON L. SCHOENHORN, ESQUIRE
SARA PACKMAN, ESQUIRE

HOWD & LUDORF, LLC
Attorneys for the Defendant
65 Wethersfield Avenue
Hartford, Connecticut 06114-1190
(860) 249-1361
BY: THOMAS R. GERARDE, ESQUIRE

OFFICE OF THE CORPORATION COUNSEL
Attorneys for the City of Hartford
550 Main Street
Hartford, Connecticut 06103
(860) 757-9700
BY: NATHALIE FEOLA-GUERRIERI, ESQUIRE
Assistant Corporation Counsel

ALSO PRESENT: GLEN HARRIS, Plaintiff

NICOLE M. GOSSELIN, R.P.R.
CONNECTICUT LICENSE NUMBER: 00084

1 A Towards the top.

2 The police officer or Seven?

3 Q I said "Seven," didn't I?

4 A And Seven --

5 MR. SCHOENHORN: You said "he."

6 MR. GERARDE: Who am I referring to? I
7 meant Seven.

8 A Yes, he was in the front, this here.

9 BY MR. GERARDE:

10 Q And by the time you first saw him as you came
11 around the Dumpster, was Seven already on the ground?

12 A Yes.

13 Q He had already been shot at least once?

14 A Yes.

15 Q Do you remember how many times?

16 A Twice.

17 Q Did you see Seven get shot the first time?

18 A No.

19 Q Second time?

20 A The first two shots were like bam-bam, so it
21 wasn't like it was space between them.

22 Q The first two shots were bam-bam?

23 A Yes.

24 Q All right. And where do you think you were when
25 you heard those shots?

1 A I was running towards the front.

2 Q Okay. But I imagine you would have been --

3 A I was at the Dumpster, just like getting from
4 the Dumpster to get to the front of the house.

5 Q Okay. So if we use Exhibit C, we can't see the
6 Dumpster in the exhibit, but we have been told by your dad
7 that the Dumpster is behind where his truck is parked?

8 A Yes.

9 Q All right. So, obviously, your dad's truck was
10 not in the driveway when this happened because he was at
11 work, right?

12 MR. SCHOENHORN: It was.

13 MR. GLEN HARRIS: It was.

14 A It was, yes, he has two trucks.

15 MR. GERARDE: Okay. Well, thank you for
16 clarifying that.

17 BY MR. GERARDE:

18 Q Okay. So this vehicle we are looking at in
19 Exhibit 1-C, that vehicle was there on the day the police
20 showed up?

21 A Yes.

22 Q And it was parked in front of the Dumpster we
23 see in 1-E?

24 A Yes.

25 Q And are you saying that when the first two shots

1 were fired, you were alongside the Dumpster on your
2 driveway?

3 A Yes. I was like right here, just on the other
4 side, though, just on the other side.

5 Q Okay. I want to try and point to where you are.

6 A I was like right here, just on the opposite
7 side.

8 Q Okay.

9 A I was just leaving the Dumpster.

10 Q Okay. I'm going to try and describe that for
11 the record. We are using Exhibit E, and you pointed
12 towards the part of the Dumpster that was closest to the
13 street, the end of the Dumpster closest to the street
14 versus closest to the back of your driveway?

15 A Okay.

16 Q But only not on the side that you can see in the
17 photograph, on the other side of it?

18 A Yes.

19 Q Okay. So if your path was to go from the
20 backyard and then to run alongside the Dumpster, you had
21 just about finished running alongside the Dumpster when the
22 shots were fired?

23 A Yes. When the shots were fired, I kind of
24 stopped not -- like at the front of my dad's truck, and I
25 was just trying to kind of figure what was going on. Then

1 I saw the police officer, so...

2 Q Okay. When the shots were fired, in terms of
3 hearing them, you were on the side of the Dumpster opposite
4 the side we see in photograph 1-E, and almost finished
5 running alongside it and reaching your father's car?

6 A Yes.

7 Q And then you say you stopped?

8 A Yes. Because I heard the gunshots. So I
9 didn't, like kind of didn't know what to do. I was kind of
10 lost.

11 Q Okay. Let me ask you, did you know that those
12 were gunshots when you heard those noises or were they just
13 startling loud noises?

14 A They were just startling really close. And I
15 heard the cars beeping horns, and I was like, Did my dog
16 get hit and whatnot? So I was kind of confused.

17 And when I stopped, I saw a police officer, and
18 I said, "Don't shoot my dog," because I saw my dog on the
19 ground.

20 And he looked at me and he shot him. Well, he
21 didn't go to him and shoot him, but he still shot him.

22 I said, "Don't shoot my dog." He looked at me,
23 leaned over, and he shot him in the head. Again. For no
24 reason.

25 Q Do you know whether or not Seven was hit with

1 STATE OF CONNECTICUT :

2 ss.


3 COUNTY OF HARTFORD :

4
5 I, Nicole M. Gosselin, R.P.R., a Notary
6 Public for the state of Connecticut, do hereby certify that
7 the deposition of K.H., was taken before me pursuant to the
8 Federal Rules of Civil Procedure, at the offices of Howd &
9 Ludorf, LLC, 65 Wethersfield Avenue, Hartford, Connecticut,
10 commencing at 10:20 a.m., on Wednesday, May 6, 2009.

11 I further certify that the witness was first
12 sworn by me to tell the truth, the whole truth, and nothing
13 but the truth, and was examined by counsel, and her
14 testimony stenographically reported by me and subsequently
15 transcribed as hereinbefore appears.

16 I further certify that I am not related to
17 the parties hereto or their counsel, and that I am not in
18 any way interested in the event of said cause.

19 Dated at Hartford, Connecticut, the 27th day
20 of May, 2009.

21 
22 Nicole M. Gosselin, R.P.R.
Notary Public

23 My Commission Expires December 31, 2011
24
25

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO.
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	3:08CV01644(RNC)
	:	
JOHNMICHAEL O’HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	SEPTEMBER 11, 2009

**MOTION TO STRIKE SO-CALLED “56(a)(2) STATEMENT” AND RESPONSE TO
NEWLY RAISED CLAIM OF NONCOMPLIANCE WITH DISCOVERY**

Pursuant to Federal Rule of Civil Procedure 12, the plaintiffs, by and through their attorneys, Jon L. Schoenhorn & Associates, LLC., hereby respectfully move this Court to strike “Defendants’ Local Rule 56(a)(2) Statement in Reply to Plaintiffs’ Objection to Defendants’ Motion for Summary Judgment.” The plaintiffs also respectfully request the Court to consider the necropsy report offered by the plaintiffs in objection to the defendants’ motions for summary judgment because the plaintiffs properly disclosed the report in discovery despite the defendants’ false accusations to the contrary. In support hereof, the plaintiffs state as follows:

1. On August 10, 2009, Defendants O'Hare and Pia filed a motion for summary judgment, with accompanying memorandum and Local Rule 56(a)1 Statement. On August 31, 2009, the plaintiffs filed their response and incorporated a Local Rule 56(a)2 Statement as required by the Local Rules.

2. On September 10, 2009, the Defendants O’Hare and Pia filed a Reply to the Plaintiff’s Objection to Defendants’ Summary Judgment (hereinafter “Defendants’ Reply”) and attached a document that they erroneously called “Defendants’ Local Rule 56(a)(2) Statement in Reply to Plaintiffs’ Objection to Defendants’ Motion for Summary Judgment.”

ORAL ARGUMENT REQUESTED

3. This document purports to allege facts not previously raised in any of the defendants' memoranda or supporting documents relating to either the defendants' motion for summary judgment or the plaintiff's separate motion for summary judgment. Furthermore, the so-called "Local Rule 56(a)(2) Statement in Reply to Plaintiffs' Objection to Defendants' Motion for Summary Judgment" contains legal arguments concerning the materiality of several facts. Since all the deadlines for filing papers related to motions for summary judgment have passed, the plaintiff can not respond to these new allegations, which are wholly improper.

4. Nothing in Fed. R. Civ. Proc. 56, D. Conn. Civ. R. 56, or D. Conn. Civ. R. 7(d)(concerning reply briefs) allows such a statement. Loc. R. 7(d) reads as follows: "A reply brief may not exceed 10 pages [and] must be strictly confined to a discussion of matters raised by the responsive brief." Aside from the fact that the defendants' reply brief is actually eleven pages, this new filing adds five additional pages of newly raised material and arguments in direct contravention of the Local Rules. Summary judgment should not be like a game of poker, in which parties withhold facts until the opponent "calls" and only then show one's hand. Thus, the purported "56(a)2 Statement" is not only improper under the rules, but unfair.

5. Therefore, this so-called 56(a)2 Statement in support of summary judgment violates the Local Rules of Civil Procedure and must be stricken.

6. The Defendants' Reply also claims that a necropsy report, offered by the plaintiffs in response to the defendants' motion for summary judgment, was never disclosed in discovery. Defs.' Reply, p. 4. This is untrue.

7. In his response to Defendant City of Hartford's Interrogatories and Requests for Production, submitted on April 15, 2009, Plaintiff Glen Harris specifically refers to "the enclosed necropsy report." (Relevant pages attached as Exhibit A) Moreover, the document was scanned as a digital file the previous day and submitted with the discovery response.

8. The defendants never claimed that the plaintiffs' production was incomplete, despite

the explicit reference to the necropsy report in the response to paragraph 23 of the defendants' production requests.

9. Therefore, the plaintiffs sent a copy of the necropsy report to the defendants and any outrageous claim to the contrary is untrue and should be rejected out of hand.

WHEREFORE, the plaintiffs hereby request that the New Statement of Facts be stricken and that the Court consider the necropsy report when ruling on the defendants' motion for summary judgment.

THE PLAINTIFF–
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: civlrights@aol.com
Juris No. ct00119

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Summary Judgment\Mot-Strike.wpd

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

<hr/> <div>GLEN HARRIS, individually and PPA As guardian for K.H., a minor child : Plaintiffs : v. : : : : : JOHNMICHAEL O'HARE, ANTHONY PIA and CITY OF HARTFORD, : Defendants :</div> <hr/>	CIVIL ACTION NO. 3:08-cv-01644 (RNC) April 15, 2009
---	---

**PLAINTIFF'S COMPLIANCE WITH DEFENDANT CITY OF HARTFORD'S
INTERROGATORIES AND REQUESTS FOR PRODUCTION**

The plaintiff, Glen Harris, hereby complies with Defendant City of Hartford's Interrogatories and Requests for Production Directed to the Plaintiff dated March 13, 2009 as follows:

BY WAY OF INTERROGATORIES

1. Please state the full name, residence address, business address, social security number, valid Connecticut motor vehicle operator's license number, date of birth, of the person answering these interrogatories.

ANSWER: Glen Harris
67 Lebanon Street
Hartford, CT 06112
(860) 727-9559

19. Copies of all records demonstrating the fact that the fencing referred to in Plaintiff's Complaint was installed on 297 Enfield Street real property, ownership of the fencing, maintenance of the fencing and any all evidence of bills and evidence of payment for fence installation and/or maintenance.

OBJECTION: This request for production is irrelevant and is not likely to lead to the discovery of admissible evidence.

20. Copies of any and all complaints filed by the Plaintiff regarding a police officer within 10 years of December 20, 2006, to the present.

NOT APPLICABLE

21. Copies of any lawsuits filed against the Plaintiff or by the Plaintiff for any personal injuries within 10 years prior to December 20, 2006, to the present.

OBJECTION: This request for production is irrelevant and is not likely to lead to the discovery of admissible evidence.

22. Copies of any and all complaints made by Plaintiff or by minor child, K.H., of emotional distress or stress caused to her within 10 years prior to December 20, 2006, to the present.

Neither the plaintiff nor the minor child has made such complaints outside of the present action.

23. Copies of all veterinary reports concerning the health and cause of the death of the dog referred to in Plaintiff's Complaint.

Please see also response to request for production 3. Copies of bills related to the enclosed necropsy are no longer in the plaintiff's possession. Attempts will be made to obtain copies of these bills.

24. Copies of medical and veterinary bills of the dog referred to in Plaintiff's Complaint.

Please see responses to requests for production 3 and 23.

25. Copies of all bills associated with disposal of the dog's remains.

Copies of these bills are no longer in the plaintiff's possession. Attempts will be made to obtain copies of these bills.

26. Copies of all documents which refer to your response to Interrogatory No. 23.

Enclosed in the response to requests for production 9 are the medical records and bills currently in the plaintiff's possession. Requests for the plaintiffs' complete medical files have been submitted and the files will be forwarded upon receipt.

27. Copies of all documents which refer to your response to Interrogatory No. 24.

Please see response to request for production 2.

28. Copies of all documents which refer to your response to Interrogatory No. 25.

NOT APPLICABLE

THE PLAINTIFF,
GLEN HARRIS individually and PPA
As guardian for K.H., a minor child

BY /s/ Jon L. Schoenhorn
JON L. SCHOENHORN.
Jon L. Schoenhorn & Associates
108 Oak Street
Hartford, CT 06106
Fed. Bar No. CT 00119
(860) 278-3500

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS
Individually and PPA as guardian
For K.H., a minor child,
Plaintiffs

v.

JOHNMICHAEL O'HARE
ANTHONY PIA, and
CITY OF HARTFORD

:
:
:
:
:
:
:
:
:
:
:

NO.: 3:08-cv-1644 (RNC)

SEPTEMBER 11, 2009

**DEFENDANT CITY OF HARTFORD'S REPLY TO PLAINTIFFS' OBJECTION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The defendant, City of Hartford, respectfully replies to the objection to the motion for summary judgment by adopting and incorporating herein by reference the arguments and supporting documents filed by the Defendants' O'Hare and Pia in this matter. Wherefore, the City of Hartford requests that its motion for summary judgment be granted.

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri
Assistant Corporation Counsel
It's Attorney
550 Main Street
Hartford, CT 06103
Federal Bar No. ct17217
Telephone (860) 757-9700
Facsimile (860) 722-8114
Email: feoln001@hartford.gov

CERTIFICATION

This is to certify that on September 11, 2009, a copy of the foregoing Motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Thomas Gerarde, Esq.
Alan R. Dembiczak, Esq.
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

II. LAW AND ARGUMENT

A. LEGAL STANDARD

The plaintiff's motion to strike is brought pursuant to Federal Rule of Civil Procedure 12. (Pl. M. Strike. at p. 1) Fed. R. Civ. Pro. 12(f), states "the court may strike from a pleading an insufficient defense or any redundant immaterial, impertinent or scandalous matter." "The standard that applies to a motion to strike is the 'mirror image' of the standard on a 12(b)(6) motion to dismiss for failure to state a claim." Cohen v. Elephant Wireless, Inc., No. 03-CV-4058, 2004 WL 1872421, at *2 (S.D.N.Y. Aug. 19, 2004). Motions to strike "are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute." Kehr ex rel. Kehr v. Yamaha Motor Corp., U.S.A., No. 08-CV-7379, 2008 WL 5191210, at *7 (S.D.N.Y. Dec. 5, 2008). On a Rule 12(f) motion "the plaintiff must show that: '(1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense.'" SEC v. Alexander, 248 F.R.D. 108, 109 (E.D.N.Y.2007) (*citing* SEC v. McCaskey, 56 F.Supp.2d 323, 326 (S.D.N.Y.1999)).

B. THE DEFENDANTS' REPLY BRIEF IS PROPER, AND FULLY COMPLIES WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S LOCAL RULES

First, the defendants' reply brief and supporting documentation fully complies with the Federal Rules of Civil Procedure and this Court's local rules. There is nothing in Fed.R.Civ.P. 56, D.Conn. Local Rule 56 or D.Conn. Local Rule 7(d) that disallows a reply brief to be supported by attachments or other documentation. Again, the plaintiffs

merely do not want the court to hear or consider the clear, unambiguous and undisputed facts in this matter.

Next, the reply brief does not “allege facts not previously raised” or new “legal arguments” as argued in the plaintiffs’ motion to strike. (Pl. M. Strike. at p. 2, ¶ 3) Most importantly, it is of no consequence if it did. D.Conn. Local Rule 7(d) limits the reply brief to a “discussion of the matters raised by the responsive brief.” There is nothing in D.Conn. Local Rule 7, the Federal Rules of Civil Procedure or any other Local Rule forbidding one to cite to additional facts in the record in support of their arguments. Also, the plaintiffs have cited to no statutory law, case law or court rule that forbids a party to cite to *additional facts in the record* in their reply brief. Moreover, the reply brief clearly and unequivocally addresses the “matters raised” in the opposition to the summary judgment, which is exactly what D.Conn. Local Rule 7(d) calls for. It appears that the plaintiffs are making every effort to prevent the court from hearing the material facts in this case. However, the defendants’ reply brief and supporting statement of facts is in full compliance with all of the court’s rules.

C. KATHLEEN DEERING WAS NEITHER PROPERLY NOR TIMELY DISCLOSED IN THIS MATTER, AND EVEN IF SHE WAS, THE EXPERT WITNESS REPORT DOES NOT AFFECT THE OUTCOME OF THE DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

The plaintiffs’ opposition to the defendants’ motion for summary judgment refers to a necropsy record. (Pl. Obj. at p. 14); (Pl. Obj. Ex. SJ-20). A thorough review of the file in this matter by defense counsel did not reveal any such record. However, even taking plaintiffs’ argument and discussion in the motion to strike at face value (Pl. M.

Strike. at pp. 2-3), the necropsy record does not affect the outcome of the defendants' motion for summary judgment. The defendants' motion for summary judgment and reply brief, even taking into consideration the record, clearly shows that there are no material issues of disputed fact and the defendants are entitled to judgment as a matter of law.

Furthermore, the plaintiffs do not dispute that Kathleen Deering, who authored the supporting affidavit and record, was not properly disclosed as an expert witness in this matter. (Pl. M. Strike.) Fed.R.Civ.P. 56 (e)(1) mandates that a "supporting or opposing affidavit [in support of or opposition to a motion summary judgment] must be made on personal knowledge, set out facts that *would be admissible in evidence*, and show that the affiant is competent to testify on the matters stated." (emphasis added).

It is undisputed that Kathleen Deering was not properly disclosed as an expert witness in this matter. (Pl. M. Strike.) Under Rule 37(c), where "a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1). "The purpose of [Rule 37(c)] is to prevent the practice of 'sandbagging' an adversary with new evidence." Ventra v. United States, 121 F.Supp.2d 326, 332 (S.D.N.Y.2000) (*citing Johnson Elec. N.A. v. Mabuchi Motor Am. Corp.*, 77 F.Supp.2d 446, 458 (S.D.N.Y.1999)).

Furthermore, Fed.R.Civ.P. 26 (a)(2)(A) states, "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed.R.Civ.P. 26 (a)(2)(B) requires that, "this

disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony". Also, the "written report" is required to include extensive information. See, Fed.R.Civ.P. 26 (a)(2)(B)(i)-(vi). Finally, Fed.R.Civ.P. 26 (a)(2)(C) states that, "[a] party must make these disclosures at the times and in the sequence that the court orders." The deadline for all discovery in this matter expired on June 30, 2009, and to date the defendants have not received any such "written report." Instead, the defendants have merely received the identity of the Kathleen Deering, her affidavit and a medical record. At no time, have the defendants received the "written report" required by Fed.R.Civ.P. 26 (a)(2)(B).

Since Kathleen Deering was not properly disclosed as an expert witness in this matter, the affidavit and medical record should be excluded as it is not admissible in evidence. However, even considering the record and affidavit, it does not affect the outcome of the defendants' motion for summary judgment. The defendants' motion for summary judgment and reply brief, even taking into consideration the report, clearly shows that there are no material issues of disputed fact and the defendants are entitled to judgment as a matter of law.

D. THE PLAINTIFFS HAVE FAILED TO CARRY THEIR BURDEN UNDER FEDERAL RULE OF CIVIL PROCEDURE 12.

Most importantly, the plaintiffs have failed to carry their heavy burden under Fed.R.Civ.P. 12. Fed.R.Civ.P. 12(f), is entitled Motion to Strike, and states "[t]he court

may strike from a pleading an insufficient defense or any redundant immaterial, impertinent or scandalous matter.” Motions to strike “are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute.” Kehr ex rel. Kehr v. Yamaha Motor Corp., U.S.A., No. 08-CV-7379, 2008 WL 5191210, at *7 (S.D.N.Y. Dec. 5, 2008). There is nothing in the defendants’ reply brief that is insufficient, redundant, immaterial, impertinent or scandalous. In fact, it is direct, and on point with all of the issues raised in the motion for summary judgment and plaintiffs’ opposition to the same. Therefore, the plaintiffs have failed to carry their heavy burden under Fed.R.Civ.P. 12.

III. CONCLUSION

For these reasons, the defendants respectfully request that the court deny the plaintiffs’ motion to strike and sustain the defendants’ objection to the same.

DEFENDANTS,
JOHNMICHAEL O’HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Thomas R. Gerarde
ct05640
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
_ E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on September 23, 2009, a copy of the foregoing **Defendants' Objection to Plaintiff's Motion to Strike** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

By /s/ Alan R. Dembiczak
Alan R. Dembiczak

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA, and CITY OF HARTFORD	:	SEPTEMBER 24, 2009

JOINT STATUS REPORT

A. STATUS OF THE CASE

1. The plaintiffs have filed for partial summary judgment. The defendants have filed for summary judgment. The parties filed their reply briefs on September 10, 2009. These motions are pending.

2. On September 11, 2009, the plaintiffs filed a motion to strike portions of the defendants' reply brief. The defendants filed an objection to the plaintiffs' motion to strike on September 23, 2009.

3. The parties have engaged in no further attempts to settle.

B. INTEREST IN REFERRAL FOR SETTLEMENT PURPOSES

The plaintiffs are prepared to discuss settlement with a magistrate judge, but only if the defendants indicate that such discussions may be fruitful. The defendants do not believe that discussions will be fruitful at this time. Prior settlement discussions with Magistrate Judge Martinez were unsuccessful.

C. CONSENT TO A TRIAL BEFORE A MAGISTRATE JUDGE

The parties do not consent to a trial before a magistrate judge.

D. ESTIMATED LENGTH OF TRIAL

The parties estimate the length of the trial to be approximately four (4) to five (5) days.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde (ct05640)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

PLAINTIFF,
GLEN HARRIS, P.P.A.
as Guardian for K.H., a minor child

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street
Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
E-mail: Feoln001@hartford.gov

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO.
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	3:08CV01644(RNC)
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	SEPTEMBER 28, 2009

**PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTION
TO PLAINTIFFS' MOTION TO STRIKE**

Pursuant to D. Conn. L. R. 7(d), the plaintiffs hereby submit this reply to the defendants’ “Objection to Plaintiffs’ Motion to Strike,” dated September 23, 2009. Said objection is without merit and, moreover, improperly takes the opportunity to make further summary judgment arguments instead of responding to the motion at hand.

I. THE SO-CALLED “56(a)2 STATEMENT” IS IN VIOLATION OF THE LOCAL RULES OF CIVIL PROCEDURE

The defendants erroneously assert that their so called “56(a)2 Statement” complies with the Local Rules of Civil Procedure because “[t]here is nothing in Fed.R.Civ.P. 56, D.Conn. Local Rule 56 or D.Conn. Local Rule 7(d) that disallows a reply brief to be supported by attachments or other documentation.” Defs.’ Obj. to Pls.’ Mot. to Strike, at 2. This preposterous statement, aside from being wholly without merit, is also misleading. Local Rule 56 allows a party to attach a statement of facts in only two instances: annexed to a motion for summary judgment, or in the papers opposing a motion for summary judgment. Since the defendants’ so-called “56(a)2 Statement” is part of a *reply brief in support* of their own motion for summary judgment, it is improper and clearly not allowed under D. Conn. Local Rule 56. A 56(a)2 Statement is filed by a party opposing summary judgment; a key fact that defendants conveniently ignore. Therefore, it

can be considered, if at all, only under D. Conn. Local Rule 7(d) as part of the defendants' reply brief, which the local rules limit to ten pages, unless special permission is sought. Since the defendants have failed to ask this court for any such permission to exceed the 10-page rule, the so-called "56(a)2 statement" must be stricken. Excluding the additional attached exhibits, the defendants' reply brief is eighteen pages long, and raise facts and claims to which the plaintiffs have no right to reply. The defendants' flaunting of the rules simply leads to more responses and arguments *ad absurdum*, without giving the plaintiffs the right to reply.

Local Rule 7(d) also limits reply briefs to matters raised in the opposing party's memorandum. The defendants assert that their "Local Rule 56(a)(2) Statement in Reply to Plaintiffs' Objection to Defendants' Motion for Summary Judgment" does not raise new facts or new legal arguments, but this claim is simply untrue. *See*, Reply to Pls.' Obj. To Defs.' Summ. J. (Doc. No. 30), p. 16 of 33, ¶ 18 (containing new facts). *See also, id.*, at p. 13 of 33, ¶ 4, p. 14 of 33, ¶ 13; p. 15 of 33, ¶ 17; p. 16 of 33, ¶¶ 19, 22; p. 18 of 33, ¶ 23 (containing legal arguments concerning the materiality or existence of disputed facts).

The defendants also claim, again without authority, that nothing in D. Conn. Local Rule 7(d) forbids citing to additional facts after the opposing party has filed its objection. Of course, this argument is in direct contradiction to the plain language of the rule. The plaintiffs do not believe that such facts are "on the record" as the defendants claim, but in any event, the defendants did not rely on these facts at any earlier point in the summary judgment proceedings and have thereby denied the plaintiffs an opportunity to admit or deny such facts. Thus the defendants simply pile on additional facts and arguments so that they can have two or even three bites of the proverbial apple.

II. KATHLEEN DEERING'S AFFIDAVIT AND REPORT WERE PROPERLY SUBMITTED AND NECESSARILY SHOULD BE CONSIDERED

The defendants then make the misleading claim that Kathleen Deering was not disclosed

as an expert witness, even though the defendants received her report in April. The plaintiffs disclosed the report with Dr. Deering's name in a timely fashion. The defendants had timely notice that she was one of two veterinarians who performed the necropsy on the plaintiffs' pet. Furthermore, Dr. Deering's affidavit is offered solely to establish that the necropsy report is a business record and therefore admissible under FRE 803. The affidavit does not suggest any additional opinion for which a separate expert disclosure is necessary. Moreover, the defendants seem to forget that the report was filed in response to *their* motion for summary judgment, and they cite to no authority that a defendant can make claims of fact in such a motion for summary judgment, and that the opposing party is precluded from supplying any evidence to refute it. The federal rules are directly to the contrary.

In the alternative, the defendants argue that the necropsy report is immaterial to their motion for summary judgment. Of course, this is just another blatant effort to augment their summary judgment reply and is inappropriately and disingenuously added to their objection to the plaintiffs' motion to strike. This argument has nothing to do with the defendants' false claim that they did not know of this report.

In any event, if the defendants believed the necropsy report was immaterial, they should have raised that argument in their summary judgment reply. They did not do so, and are now precluded from making that argument here. In any event, if it is "immaterial," they are certainly not prejudiced by the court's consideration of the facts contained therein. Normally, the plaintiff would not reply here to such an outrageous and blatant attempt to get three or four bites of the apple. However, in the alternative, if the court does choose to consider the defendants' frivolous "materiality" claim, the plaintiffs merely note that the necropsy report demonstrates that the plaintiffs' pet was killed by the shot to its brain; not by the shots to its torso. The defendants choose to ignore the minor plaintiffs' testimony that her dog was still alive, wagging its tail, lying

on its side, when Defendant O'Hare walked up to it and executed it with a shot to the head.

III. CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in their original motion to strike, the plaintiffs request that the court grant their motion to strike the defendants' reply memorandum, and overrule the objection therein to Dr. Deering's affidavit and necropsy report.

THE PLAINTIFF–
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Juris No. ct00119
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Reply2DefisObjMotStrike.wpd

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	DECEMBER 23, 2009

JOINT STATUS REPORT

A. STATUS OF THE CASE

1. The plaintiffs have filed for partial summary judgment. The defendants have filed for summary judgment. The parties filed their reply briefs on September 10, 2009. These motions are pending.

2. On September 11, 2009, the plaintiffs filed a motion to strike portions of the defendants' reply brief. The defendants filed an objection to the plaintiffs' motion to strike on September 23, 2009.

3. The parties have engaged in no further attempts to settle.

B. INTEREST IN REFERRAL FOR SETTLEMENT PURPOSES

The plaintiffs are prepared to discuss settlement with a magistrate judge, but only if the defendants indicate that such discussions may be fruitful. The defendants do not believe that discussions will be fruitful at this time. Prior settlement discussions with Magistrate Judge Martinez were unsuccessful.

C. CONSENT TO A TRIAL BEFORE A MAGISTRATE JUDGE

The parties do not consent to a trial before a magistrate judge.

D. ESTIMATED LENGTH OF TRIAL

The parties estimate the length of the trial to be approximately four (4) to five (5) days.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde (ct05640)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

PLAINTIFF,
GLEN HARRIS, P.P.A.
as Guardian for K.H., a minor child

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street
Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
E-mail: Feoln001@hartford.gov

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and P.P.A	:	CIVIL ACTION NO. 3:08CV01644 (RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs	:	
	:	
V.	:	
	:	
JOHNMICHAEL O'HARE	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD,	:	
Defendants.	:	JANUARY 29, 2010

**NOTICE OF PROVIDING SUPPLEMENTAL AUTHORITY IN
SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The plaintiffs hereby give notice that they are providing to the Court the following additional authority in support of the plaintiffs' motion for summary judgment, dated August 10, 2009, and which is also relevant to their objection to defendants' motion for summary judgment. The case is *State v. Robinson*, 290 Conn. 381 (2009), *affirming* 105 Conn. App. 179 (2008), which discusses whether a property surrounded by fences except for a gateless entry may be considered "enclosed" for purposes of state criminal trespass laws, and whether the residents of that property possess an expectation that they may exclude intruders. This case came to the undersigned's attention following the completion of the briefing schedule for both the plaintiff's and defendants' motions for summary judgment in the instant case.

THE PLAINTIFF—
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Federal Bar No. ct00119
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
(860) 278-3500
Fax: (860) 278-6393
civlrights@aol.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn

Jon L. Schoenhorn

HONORABLE: _____

DEPUTY CLERK _____ RPTR/ECRO/TAPE _____

TOTAL TIME: _____ hours _____ minutes

DATE: _____ START TIME: _____ END TIME: _____

LUNCH RECESS FROM: _____ TO: _____

RECESS (if more than ½ hr) FROM: _____ TO: _____

CIVIL NO. _____

=====

VS

=====

Plaintiff's Counsel

Defendant's Counsel

COURTROOM MINUTES- CIVIL☐ Motion hearing☐ Show Cause Hearing☐ Evidentiary Hearing☐ Judgment Debtor Exam☐ Miscellaneous Hearing☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐# Motion _____ ☐ granted ☐ denied ☐ advisement☐ Oral Motion _____ ☐ granted ☐ denied ☐ advisement☐ Oral Motion _____ ☐ granted ☐ denied ☐ advisement☐ Oral Motion _____ ☐ granted ☐ denied ☐ advisement☐ Oral Motion _____ ☐ granted ☐ denied ☐ advisement☐ ☐ Briefs(s) due _____ ☐ Proposed Findings due _____ Response due _____☐ ☐ filed ☐ docketed☐ ☐ filed ☐ docketed☐ ☐ filed ☐ docketed☐ ☐ filed ☐ docketed☐ ☐ filed ☐ docketed☐ ☐ filed ☐ docketed☐ Hearing continued until _____ at _____

CALENDAR AND SETTLEMENT CONFERENCE ORDER

I. PARTIES WITH FULL AUTHORITY MUST ATTEND. The parties are hereby ORDERED to be present at the conference. If a party is a legal entity, not an individual, a representative of the party who is fully authorized to decide all matters pertaining to the case shall be present at the conference. The court will not hold a settlement conference without all parties present. A party may not participate by phone without express, advance approval by the court. In cases where a party requires authority from an insurer to settle the case, the party shall ensure that an insurance company representative with full authority to settle the case is present at the conference. For a plaintiff, "full authority" means final authority to dismiss the case with prejudice, and to accept in settlement an amount or terms down to the defendant's last offer. For a defendant, "full authority" means final authority to commit a defendant to pay, in the representative's own discretion, a settlement amount up to the plaintiff's prayer or the plaintiff's last demand, whichever is lower. The purpose of this requirement is to have in attendance a person with both the authority and independence to settle the case during the settlement conference without consulting anyone not present. The requirement that parties personally appear is intended to increase the efficiency and effectiveness of the settlement conference. Failure of a party with full authority to settle the case to attend the conference may result in the imposition of sanctions. See Nick v. Morgan's Foods,

99 F. Supp. 2d 1056, 1062-63 (E.D. Mo 2000). Counsel are ordered to advise their respective clients and insurance company representatives of the Nick decision.

II. EXCHANGE OF OFFERS AND DEMANDS. Settlement conferences are often unproductive unless the parties have exchanged offers and demands before the conference and made a serious effort to settle the case on their own. Therefore, **not less than 14 days before the conference**, the plaintiff's counsel shall serve a settlement demand upon counsel for the defendant. The demand shall be accompanied by the plaintiff's analysis of damages. If the defendant disagrees with the plaintiff's calculation of damages, the defendant's counsel shall respond to the plaintiff's analysis not later than 7 working days before the conference. The defendant is encouraged to make a settlement offer prior to the settlement conference. Counsel also are ordered to confer prior to the settlement conference to attempt to settle the case without judicial intervention.

III. CONFERENCE MEMORANDA. Not later than five (5) working days prior to the conference counsel shall submit to chambers of the undersigned an ex parte, confidential conference memorandum. The memorandum shall be double spaced in no less than 12 point font and shall not exceed 10 pages. It shall include the following: (A) a list of the claims and defenses; (B) the legal elements of the claims and defenses; (C) the evidence in support of the claims and

defenses; (D) a damages analysis; (E) a discussion of the strengths and weaknesses of the case; (F) the status of the case, including the discovery remaining and substantive motions filed or contemplated; (G) settlement negotiations to date; and (H) potential resolutions of the case. The plaintiff's counsel shall attach a copy of the complaint to the plaintiff's ex parte memorandum.

IV. REQUESTS PERTAINING TO THE CONFERENCE. Any requests pertaining to the conference shall be made to the chambers of the undersigned in writing, or by telephone confirmed in writing, no later than 10 days from the date of this order. Any counsel requesting continuances, which will be considered only for good cause shown, shall consult with all opposing counsel before making the request and, in the event of a continuance, shall notify all parties of the new date and time.

rev.5/14/07

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually :
and P.P.A. as guardian for :
K.H., a minor child, :

Plaintiff, :

V. : CASE NO: 3:08-CV-1644 (RNC)

JOHNMICHAEL O'HARE, ET AL., :

Defendants. :

REFERRAL TO MAGISTRATE JUDGE

This case is hereby referred to Magistrate Judge Donna F. Martinez for the following:

_____ For all pretrial matters excluding trial, unless the parties consent to trial before the magistrate judge;

_____ To confer with the parties and enter the scheduling order required by F.R.Civ.P. 16(b);

_____ To supervise discovery and resolve discovery disputes;

_____ To conduct an early settlement conference;

 X To establish a schedule for the filing of the joint trial memoranda.

_____ To conduct a status conference;

_____ A hearing on damages and attorney fees;

 X A ruling on the following pending motions: Motion to preclude plaintiff's experts (doc. 72); Motion to preclude plaintiff's experts (doc. 74).

So ordered.

Dated at Hartford, Connecticut this 11th day of June 2010.

/s/RNC
Robert N. Chatigny, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually and	:	
P.P.A. as Guardian for K.H.,	:	
a minor child,	:	
	:	
Plaintiffs,	:	
	:	CASE NO. 3:08CV1644 (RNC)
V.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA and	:	
CITY OF HARTFORD,	:	
	:	
Defendants.	:	

AMENDED SCHEDULING ORDER

All discovery except for discovery relating to expert witnesses has been completed. With regard to expert witnesses, the scheduling order is amended as follows: By September 3, 2010, the plaintiffs shall supplement their disclosures to provide both expert's cases and Dr. Deering's qualifications, publications and compensation. See Fed. R. Civ. R. 26(a)(iv), (v) and (vi). Depositions of the plaintiff's experts, Drs. Deering and Eiswerth, shall be completed by October 4, 2010. Defendants' expert reports shall be disclosed by November 4, 2010 and any such experts will be deposed by December 6, 2010.

Joint Trial Memorandum: A joint trial memorandum in the form described below will be filed on or before December 31, 2010.

Counsel signing the memorandum must certify that it is the product of consultation between the lawyers who will be trying the case. The memorandum will be in the form prescribed by the District Court's Standing Order Regarding Trial Memoranda in Civil

Cases (see Local Rules of Civil Procedure), and must be certified that it is a joint product of consultation between the lawyers trying the case, with the following modifications:

a. **Witnesses:** Set forth the name and address of each witness to be called at trial. Provide a brief summary of the anticipated testimony of each witness and an estimate of the probable duration of his or her testimony (e.g. less than one hour, two to three hours, one full day). For each expert witness, set forth the opinion to be expressed, a brief summary of the basis of the opinion and a list of the materials on which the witness intends to rely. If a party objects to all or any part of the anticipated testimony of any witness, lay or expert, the objection must be stated in this section of the joint memorandum so that it can be addressed prior to trial.

b. **Exhibits:** The parties will prepare the list of exhibits required by the Standing Order. The list must specifically identify each exhibit by providing a brief description of the exhibit. The exhibits will be listed in numerical order starting with Plaintiff's Exhibit 1 and Defendant's Exhibit 1. If a party has an objection with regard to a designated exhibit, the objection must be stated in this section of the joint memorandum or it will be waived. Each party will prepare an original set of exhibits, plus a duplicate copy for the Court and every other party, marked with exhibit tags provided by the Clerk. The duplicate sets of

exhibits must be submitted to the Court not later than the day before the final pretrial conference. Counsel will retain the original set of exhibits for use at trial.

c. **Jury Instructions:** In jury cases, the parties will meet and confer for the purpose of preparing and filing tailored jury instructions on the elements of the parties' claims and defenses. The proposed instructions will be submitted as an attachment to the joint trial memorandum. If the parties cannot agree as to the appropriateness of a particular instruction, each party must submit a proposed instruction supported by a brief explanation of its position, including citation to applicable authority.

d. **Anticipated Evidentiary Problems:** The parties will attach motions in limine with memoranda of law concerning any anticipated evidentiary problems.

e. **Verdict Form:** In jury cases the parties will submit as an exhibit to the joint trial memorandum a proposed verdict form suitable for submission to a jury. The form may require the jury to return a special verdict with special findings as permitted by Fed. R. Civ. P. 49(a) or a general verdict with or without written interrogatories as permitted by Fed. R. Civ. P. 49(b). If the parties are unable to agree as to the appropriateness of a proposed form, the objecting party must state the basis for the objection and provide an alternative proposal.

Trial Ready List: The case will be placed on the trial ready list for **January 2011**.

SO ORDERED at Hartford, Connecticut this 19th day of August, 2010.

_____/s/_____
Donna F. Martinez
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA, and CITY OF HARTFORD	:	JANUARY 7, 2011

JOINT TRIAL MEMORANDUM

I. CERTIFICATION

The undersigned counsel certify that this Joint Trial Memorandum is the product of consultation between the lawyers who will be trying the case.

II. TRIAL COUNSEL

A. PLAINTIFFS - GLEN HARRIS, INDIVIDUALLY AND P.P.A. AS GUARDIAN FOR K.H., A MINOR CHILD

Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street
Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

B. DEFENDANTS - JOHNMICHAEL O'HARE AND ANTHONY PIA

Thomas R. Gerarde (ct05640)
Alan R. Dembiczak (ct25755)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

C. DEFENDANT - CITY OF HARTFORD
Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
E-mail: Feoln001@hartford.gov

III. JURISDICTION

This action is brought pursuant to Title 42, United States Code §§ 1983 and 1988, and the fourth and fourteenth amendments to the United States Constitution. Jurisdiction is founded upon Title 28, United States Code §§ 1331 and 1342; and the aforementioned statutory and constitutional provisions. Plaintiff also invokes the supplemental jurisdiction of this court to hear and determine claims arising under Connecticut state law and its constitution, pursuant to Title 28, United States Code § 1367.

IV. JURY/NON-JURY

This case is to be tried before a jury.

V. NATURE OF THE CASE

A. PLAINTIFFS' DESCRIPTION

This action, brought by a homeowner and his minor daughter, arises out of events on December 20, 2006, when the defendant Hartford police officers entered into the plaintiffs' yard on Enfield Street without a warrant and shot and killed the family dog.

The plaintiffs assert that the entry and subsequent killing of their dog was an illegal search and seizure under the Fourth Amendment; that killing the dog in front of the minor plaintiff violated the Fourteenth Amendment's guarantee of substantive due process; that the defendants' actions violated the Connecticut State Constitution, Article I, Section 7; that killing the dog in front of the minor plaintiff constituted the intentional infliction of emotional distress; the defendants' entry onto the property constituted a trespass; that killing the dog constituted conversion; that the defendants were negligent in entering the property without a warrant or valid exception to the warrant requirement; and that the City of Hartford should indemnify the individual defendants and pay all damages on their behalf to the plaintiffs.

The plaintiffs seek monetary and other relief to compensate them for the loss of the damages suffered by them, including loss of dog and resultant emotional distress.

B. DEFENDANTS' DESCRIPTION

Acting on a tip that there were two handguns in an abandoned vehicle in the backyard of 297 Enfield Street in Hartford, CT, Hartford Police Officers O'Hare and Pia reported to the residence. When they arrived they entered the front yard through an open gate in a chain link fence. They then walked along the side of the three family house that was located on the property, and when they reached the rear corner of the house, peeked around the corner.

They observed a large white and brown dog exiting a hole in a wooden fence located at the southwest corner of the rear yard that began to growl at the officers, "showing its teeth". The large dog then charged towards the officers, growling and barking in an aggressive manner.

The officers began to retreat, running towards the front yard with Officer Pia in front and Officer O'Hare behind, with the large dog directly behind both. The dog continued to charge at the officers, snapping its teeth in an aggressive manner. Officer Pia was able to exit the front yard through the open, unsecured front gate but Officer O'Hare was unable to find an avenue of escape due to the animal's close proximity, and therefore turned around facing the animal while it was still charging at him. Officer O'Hare then drew his department issued firearm and pointed it in the direction of the charging dog and yelled, "Get back", several times in an attempt to stop the animal's charge. The dog hesitated momentarily and then continued his charge, growling and snapping his teeth, as it approached Officer O'Hare. The dog was approximately three feet away from Officer O'Hare who had no safe avenue of escape. Fearing the dog had the potential to cause serious physical injury to himself or Officer Pia, Officer O'Hare checked his backdrop and insured it was clear, not posing a danger to any persons. Officer O'Hare then aimed his department issued firearm downward at the large dog and fired three rapid gunshots killing the dog.

VI. STIPULATIONS OF FACTS AND LAW

A. STIPULATIONS OF FACTS AND LAW

1. The plaintiff, Glen Harris, and his daughter, K.H., have been, at all times relevant to this complaint, citizens of the United States and residents of the City of Hartford, Connecticut. K.H. is a minor child.
2. This court has personal and subject matter jurisdiction over the parties and their claims.
3. On or about the date relevant to this complaint, December 20, 2006, the defendants, Johnmichael O'Hare and Anthony Pia, were municipal employees of the City of Hartford, Connecticut, employed as police officers for the City.
4. At all times relevant hereto, and in all their actions described herein, Defendants O'Hare and Pia were acting under color of state law, regulation and/or custom, and under color of their authority as a municipal employees of the City of Hartford, Connecticut.
5. The defendant City of Hartford is a municipal corporation, incorporated under the laws of the State of Connecticut, with powers to employ police officers.

6. On December 20, 2006, the minor plaintiff K.H. was twelve years old.
7. While on the plaintiffs' property located at 297 Enfield Street in the City of Hartford on or about December 20, 2006, the defendants encountered the plaintiffs' St. Bernard dog.
8. While on the plaintiffs' property, Defendant O'Hare shot the plaintiffs' St. Bernard dog, with his department issued service pistol.
9. The plaintiffs' dog died as a result of one or more gunshot wounds inflicted by Defendant O'Hare.
10. The plaintiffs mailed a Notice of Intent to Sue regarding the circumstances of this complaint to the Town Clerk of the City of Hartford on or about April 9, 2007, and the Town Clerk received said Notice of Intent to Sue on or about April 10, 2007.
11. If the defendants are liable to plaintiffs for any damages as a result of violations of tort or civil rights, the City of Hartford will indemnify the named defendants in accordance with C.G.S. §§7-101a and 7-465.

VII. PLAINTIFFS' CONTENTIONS

A. First Cause of Action: Illegal Search and Seizure under the Fourth Amendment

On December 20, 2006, the plaintiff Glen Harris, resided with his family, including K.H., his 12 year old daughter, at a house owned by him and located at 197 Enfield Street in the City of Hartford. At approximately 3 p.m., the defendants, dressed in police uniforms, entered the plaintiffs' property unlawfully and without a warrant or other legal justification, and with guns drawn. Seeking to avoid detection, the defendants stealthily moved across the plaintiffs' front yard, then along the side of the house and into the rear yard, where the minor plaintiff was outside playing with her St. Bernard dog. The dog alerted to the presence of strangers in the rear yard, at which point the defendants turned and ran back towards the front yard, causing the dog to follow after the defendants. Defendant Pia exited the front yard, but defendant O'Hare turned to face the dog, and then shot his weapon three times, killing the dog in front of the 12-year-old plaintiff.

The plaintiffs contend that the defendants violated the Fourth Amendment's protections against unreasonable searches because the yard surrounding the plaintiffs' house constituted the curtilage of the home itself, entitled to heightened privacy consideration. Furthermore, the defendants did not have a warrant or a valid exception to the warrant requirement that would grant them the legal right to enter the property. Finally, the defendants did not have any right to shoot and kill the plaintiffs' dog, which constituted an illegal and unjustified seizure.

B. Second Cause of Action: Violation of the Fourteenth Amendment's Due Process Clause by Defendant O'Hare

The plaintiffs further contend that while the defendants and the dog were moving along one side of the house, the minor plaintiff ran toward the front yard along the opposite side of the house. The child heard defendant O'Hare fire two shots before she

arrived in the front yard. When she reached the front yard, she saw her pet dog lying on the ground, still panting and wagging his tail. She also saw defendant O'Hare standing over her wounded pet, pointing his gun at the dog. The minor plaintiff screamed "No, don't shoot my dog!" Defendant O'Hare looked at the minor plaintiff, looked back at the dog, and then fired his weapon a third time, fatally shooting the dog. After the minor plaintiff ran to the body of her dog, crying and visibly upset, defendant O'Hare told her, "Sorry, miss, but your dog isn't going to make it."

This conduct violated the Fourteenth Amendment's Due Process Clause, because Defendant O'Hare's action shocks the conscience and offends fundamental democratic notions of fair play and liberty by maliciously executing a family pet in front of a child.

C. Third Cause of Action: State Constitutional Violation, Article I, § 7 By Defendants O'Hare and Pia

The plaintiffs contend that defendants' conduct described in the previous two sections also violates the Connecticut Constitution, Article First, § 7.

D. Fourth Cause of Action: Intentional Infliction of Emotional Distress Against Defendant O'Hare

Plaintiffs contend that Defendant O'Hare's conduct as described under the Second Cause of action also forms the basis of a cause of action for intentional infliction of emotional distress.

E. Fifth Cause of Action: Trespass Claim Against Defendants O'Hare and Pia

The plaintiffs contend that defendants' conduct described in the First Cause of Action also forms the basis for a claim of trespass under Connecticut law.

F. Sixth Cause of Action: Conversion Claim Against Defendant O'Hare

The plaintiffs contend that defendants' conduct described in the First and Second Causes of Action also forms the basis for a claim in common law conversion.

G. Seventh Cause of Action: Negligence claim against Defendants O'Hare, Pia, and the City of Hartford

The plaintiffs contend that the defendants' conduct described in the First Cause of Action also forms the basis for a claim in common law negligence.

H. Eighth Cause of Action: Indemnification against the City of Hartford

On April 9, 2007, the plaintiffs sent a Notice of Intent to Sue to the Town Clerk of the City of Hartford, which was duly received on April 10, 2007. Therefore, the City of Hartford is obligated to indemnify the individual defendants under Connecticut General Statutes §§7-101a and 7-465.

VIII. DEFENDANTS' CONTENTIONS

On December 20, 2006, two officers of the Hartford police arrested a Mr. Hemmingway at 717 Garden Street with several bags of heroin on his person. Mr. Hemmingway informed the officers that in the rear of 297 Enfield Street there was an abandoned gray vehicle that contained two guns. Hemmingway would not say how he knew about the guns, but stated that they were located in the vehicle.

Hartford Police Officers O'Hare and Pia reported to the residence. When they arrived they entered the front yard through an open gate in a chain link fence. They then walked along the side of the three family house that was located on the property, and when they reached the rear corner of the house, peeked around the corner.

Before entering the back yard they saw the dog, turned around and ran. This area of the yard they entered was not enclosed, and the plaintiffs took no steps whatsoever to protect said area from entry or from view.

There was no fence that enclosed the property, and in fact, the front gate to the chain link fence was left open. Along the edge of the front yard of the property was an approximate 4 foot high chain link fence with multiple openings. The chain link fence had a large opening where the driveway was located. There was also a gate in the chain link fence leading to the front door, which was left open. Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard. Furthermore, there was a portion of fencing on the side of the property that was knocked down. Finally, there was no fence or barrier separating the front yard from the backyard.

Further, neither the front nor back yard was enclosed by fencing or some other barrier, there was a large opening in the front fence where the driveway was located, and the front gate was left open. There was also no fencing or other barrier separating the front yard from the back yard. Further, there was no stockade or similar type fence in the front yard blocking ones view, but merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no "No trespassing" signs or anything to that effect to keep people out of the property.

The officers observed the large dog, the dog looked in their direction and began to growl and charge at them. As the officers were running, the large dog was growling, snapping and lunging at O'Hare. The dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner.

When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog. The dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. The dog continued to gain on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. Therefore, after making every effort to outrun the dog and get the dog to stop by yelling get back, O'Hare was left with no other choice than to shoot the dog as he believed that it was about to attack him. Officer O'Hare discharged three rapid succession shots into the dog stopping it instantly.

The Fourth Amendment claims fail as the entry into the yard was not a Fourth Amendment search, as the area of the plaintiffs' yard the officers entered was not curtilage and therefore there was no reasonable expectation of privacy in said area.

Also, the killing of the dog was reasonable under the circumstances, as it posed an imminent threat to O'Hare. The substantive due process claims fail as the Fourth Amendment is the appropriate remedy and even if it were not, the actions of the officers did not shock the conscience. Also, the officer are entitled to qualified immunity.

The failure to intervene claim fails, as Officer Pia did not have a realistic opportunity to intervene and did not reasonably believe that the plaintiffs' rights were being violated, as the killing of the dog was justified. The Connecticut Constitution claim fails as it is not a recognized claim, and even if were, O'Hare's action of killing the dog was justified, as the dog posed an imminent threat.

The intentional infliction of emotional distress claim fails as there is no right to sue an individual for intentional infliction of emotional distress resulting from the death of a pet, and even if there was, the officers actions were not extreme and outrageous. The trespass claim fails as the officers were performing official duties and therefore licensees. The conversion claim fails as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified. Finally, the negligence claim fails as the officers are entitled to governmental immunity, and the defendants did not breach any duty owed to the plaintiffs.

IX. LEGAL ISSUES

- A. Whether the area of the plaintiffs' yard the officers entered was curtilage?
- B. Whether the dog posed an imminent threat to the officers?
- C. Whether the officer are entitled to qualified immunity on the Fourth Amendment claims?
- D. Whether the plaintiffs have a viable substantive due process claim?
- E. Whether the actions of the officers shocked the contemporary conscience?
- F. Whether the officer are entitled to qualified immunity on the substantive due process claim?
- G. Whether officer Pia had a realistic opportunity to intervene?
- H. Whether the plaintiff has a viable claim under the Connecticut Constitution?
- I. Whether the officers entry into the property and killing of the dog was justified under the Connecticut Constitution?
- J. Whether the officer are entitled to qualified immunity on the Connecticut Constitution claim?
- K. Whether Connecticut recognizes a right to sue an individual for intentional or negligent infliction of emotional distress resulting from injury to property, such as a pet?
- L. Whether the officers' actions were extreme and outrageous?
- M. Whether the officers were not trespassers, but licensees?
- N. Whether the officers exercised an unauthorized dominion over the dog, amounting to a conversion?
- O. Whether the officers are entitled to governmental immunity?
- P. Whether the plaintiffs have proved their claims of negligence?
- Q. Whether the officers actions were reckless?
- R. Whether the defendants acted jointly or conspired with each other?

- S. Whether the defendants violated the plaintiffs' Fourth Amendment rights?
- T. Whether the defendants violated the plaintiffs' Fourteenth Amendment rights?
- U. Whether the defendants violated Connecticut Constitution, Art I, Sec. 7?
- V. Whether the defendants committed the torts of trespass, conversion, intentional infliction of emotional distress and/or negligence?

X. VOIR DIRE QUESTIONS

The Plaintiffs' Proposed Voir Dire Questions are attached as **Exhibit A**, O'Hare and Pia's Proposed Voir Dire Questions are attached as **Exhibit B** and City of Hartford's Proposed Voir Dire Questions are attached as **Exhibit C**.

XI. WITNESSES

A. PLAINTIFFS' WITNESSES

1. **Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in his complaint, including the facts, his home ownership, and damages suffered. Anticipated testimony will last three hours
2. **K. H., daughter of Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in her complaint, including the facts contained in the complaint, their impact on her, and damages suffered. Two hours
3. **Tashona Ayers**, 297 Enfield Street, Hartford, CT. Ms. Ayers is a resident of 297 Enfield Street and will testify about some of the events that occurred as described in the complaint, having been present at the location on December 20, 2006, including its effect on the emotional state of the minor plaintiff that day and subsequently. Two hours
4. **K. Deering, DVM**, Storrs, CT. Dr. Deering performed the veterinary necropsy on the plaintiffs' dog and is likely to have information regarding observations, the cause of death and the dog's general health at the time of death. The veterinary examination of the dog may be introduced through a records keeper for the University of Connecticut School of Veterinary Medicine. One hour
5. **R. French, DVM, PhD**, Storrs, CT. Dr. French performed the veterinary necropsy on the plaintiffs' dog and may testify concerning his observations and findings concerning same. One hour
6. **CT DVM**, Recordskeeper re: necropsy observations and findings. Storrs, CT. A recordskeeper will be called unless a stipulation is reached. Half Hour
7. **Nancy A. Eiswirth, Ph. D.**, 664 Prospect Avenue, Hartford, CT. Dr. Eiswirth evaluated and treated the minor plaintiff for mental distress after the defendants' encounter with the plaintiff on

December 20, 2006, will offer both factual and expert testimony regarding the emotion distress suffered by the plaintiff, including the need for subsequent mental health treatment, caused by the defendants' conduct. She will also offer an expert opinion regarding the child's emotional condition and diagnosis of post-traumatic stress syndrome as being proximately caused by the defendants' conduct, including her subsequent psychiatric hospitalization and outpatient care. Her opinions will be based upon the information disclosed in the plaintiffs' disclosure of expert testimony. Two hours

8. **Recordskeeper, WFSB-TV (or designee)**, Rocky Hill. CT. A representative of WFSB-TV may be called to authenticate news footage of the scene as it was recorded on December 20, 2006, unless stipulation reached. Half hour
9. **Recordskeeper, Hartford Police Department**. A representative of the communications division of the HPD may be called to authenticate radio communications from the defendants and various officers who were at or called to 297 Enfield Street, Hartford on December 20, 2006 and to explain how transmissions are captured and recorded. Half hour
10. **Sgt. Gabriel Laureano**, Hartford Police Department, Hartford, CT. Sgt. Laureano may testify about his interactions with a suspect named George Hemingway prior to the defendants' arrival at 297 Enfield Street, and his communications with the defendants. He will also testify as to his observations at 297 Enfield Street that day. Sgt. Laureano is expected to testify that he did not tell either of the defendants that he had reason to believe that some type of illegal transaction between individuals was about to occur or was occurring on December 20, 2006 at plaintiffs' property at 297 Enfield Street. Said testimony will also be used in anticipated impeachment of contrary claims by the defendants about what Laureano told them, unless defendants' testimony is barred. One hour
11. **George Hemingway**, DOC. If the defendants attempt to elicit statements allegedly attributable to Mr. Hemingway, then the plaintiffs may call Mr. Hemingway to deny making the statements in question. One hour
12. **Sgt. Shawn St. John**, Hartford Police Department. Sgt. St. John is expected to testify to his observations on Enfield Street on the date of the incident, and to statements made by the defendants. One hour
13. **Ramon Baez Sr. and/or Carlos Ocasio**, Hartford Police Department. One or both of these police detectives will testify to their observations at the scene on the date of the incident, and to their retrieval and recovery of certain items relevant to the investigation. Half hour (each)

14. **Officer Agostino**, Hartford Police Department. Officer Agostino will testify regarding his dispatch to Enfield Street on the date of the incident, to his observations at the plaintiffs' property, and to statements made by the defendants. One hour
15. **Recordkeepers for various medical providers who treated K.H.**, unless authenticity as business and/or hospital records is stipulated. ten minutes for each
16. **Recordskeeper, Children's Medical Center and IOL**, half hour.

B. O'HARE AND PIA'S WITNESSES

1. **Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in his complaint, including the facts, his home ownership, and damages suffered. It is anticipated that his testimony will last between two to three hours.
2. **K. H., daughter of Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in her complaint, including the facts contained in the complaint, their impact on her, and damages suffered. It is anticipated that her testimony will take approximately two to three hours.
3. **Tashona Ayers**, 297 Enfield Street, Hartford, CT. Ms. Ayers will testify about some of the events that occurred as described in the complaint. It is anticipated that her testimony will take approximately one to two hours.
4. **John Michael O'Hare**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
5. **Anthony Pia**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
6. **Gabe Laureano**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
7. **Nancy A. Eiswirth, Ph. D.**, 664 Prospect Avenue, Hartford, CT. Dr. Eiswirth evaluated and treated the minor plaintiff for mental distress before and after the defendants' encounter with the plaintiff on December 20, 2006, will offer both factual and expert testimony

regarding the emotion distress suffered by the plaintiff, including the need for subsequent mental health treatment, before and after the subject incident. She will also offer an expert opinion regarding the child's emotional condition and diagnosis of post-traumatic stress syndrome as being proximately caused by the defendants' conduct, including her subsequent psychiatric hospitalization and outpatient care, and any pre-existing conditions she had. It is anticipated that her testimony will last between two to three hours.

8. **Recordskeeper, Hartford Police Department.** A representative of the communications division of the HPD may be called to authenticate radio communications from the defendants and various officers who were at or called to 297 Enfield Street, Hartford on December 20, 2006.
9. **George Hemingway, DOC.** It is anticipated that Mr. Hemingway will testify as to the information he provided to the officers on the date of the incident. It is anticipated that his testimony will last between one to two hours.
10. **Sgt. Shawn St. John, Hartford Police Department.** Sgt. St. John is expected to testify to his observations on Enfield Street on the date of the incident, and to statements made by the defendants.
11. **Ramon Baez Sr. and/or Carlos Ocasio, Hartford Police Department.** One or both of these police detectives will testify to their observations at the scene on the date of the incident, and to their retrieval and recovery of certain items relevant to the investigation.
12. **Officer Agostino, Hartford Police Department.** Officer Agostino will testify regarding his dispatch to Enfield Street on the date of the incident, to his observations at the plaintiffs' property, and to statements made by the defendants.
13. **Recordskeeper, Children's Medical Center.**

C. CITY OF HARTFORD'S WITNESSES

1. **Glen Harris, 297 Enfield Street, Hartford, CT 06112.** The plaintiff will testify regarding the allegations in his complaint, including the facts, his home ownership, and damages suffered. It is anticipated that his testimony will last between two to three hours.
2. **K. H., daughter of Glen Harris, 297 Enfield Street, Hartford, CT 06112.** The plaintiff will testify regarding the allegations in her complaint, including the facts contained in the complaint, their impact on her, and damages suffered. It is anticipated that her testimony will take approximately two to three hours.
3. **Tashona Ayers, 297 Enfield Street, Hartford, CT.** Ms. Ayers will testify about some of the events that occurred as described in the complaint. It is anticipated that her testimony will take approximately one to two hours.

4. **John Michael O'Hare**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
5. **Anthony Pia**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
6. **Gabe Laureano**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
7. **Nancy A. Eiswirth, Ph. D.**, 664 Prospect Avenue, Hartford, CT. Dr. Eiswirth evaluated and treated the minor plaintiff for mental distress before and after the defendants' encounter with the plaintiff on December 20, 2006, will offer both factual and expert testimony regarding the emotion distress suffered by the plaintiff, including the need for subsequent mental health treatment, before and after the subject incident. She will also offer an expert opinion regarding the child's emotional condition and diagnosis of post-traumatic stress syndrome as being proximately caused by the defendants' conduct, including her subsequent psychiatric hospitalization and outpatient care, and any pre-existing conditions she had. It is anticipated that her testimony will last between two to three hours.
8. **Recordskeeper, Hartford Police Department**. A representative of the communications division of the HPD may be called to authenticate radio communications from the defendants and various officers who were at or called to 297 Enfield Street, Hartford on December 20, 2006.
9. **George Hemingway**, DOC. It is anticipated that Mr. Hemingway will testify as to the information he provided to the officers on the date of the incident. It is anticipated that his testimony will last between one to two hours.
10. **Sgt. Shawn St. John**, Hartford Police Department. Sgt. St. John is expected to testify to his observations on Enfield Street on the date of the incident, and to statements made by the defendants.
11. **Ramon Baez Sr. and/or Carlos Ocasio**, Hartford Police Department. One or both of these police detectives will testify to their observations at the scene on the date of the incident, and to

their retrieval and recovery of certain items relevant to the investigation.

12. **Officer Agostino**, Hartford Police Department. Officer Agostino will testify regarding his dispatch to Enfield Street on the date of the incident, to his observations at the plaintiffs' property, and to statements made by the defendants.
13. **Recordskeeper, Children's Medical Center.**

XII. EXHIBITS

A. PLAINTIFFS EXHIBITS

1. Picture of Front Yard 1 (SJ-5)
2. Picture of Front Yard 2 (SJ-8)
3. Picture of Rear Yard (SJ-6)
4. Picture of Side of House (001_11.JPG)
5. Picture of Plaintiffs' Dogs (001_1.JPG)
6. Bill of Sale to plaintiff for St. Bernard puppy
7. Aerial View of 297 Enfield Street
8. Picture showing "Beware of Dog" Sign
9. Warranty deed for 297-99 Enfield Street
10. HPD Radio broadcasts from 12-20-06 with transcript
11. WFSB-TV news footage of scene
 - a. **OBJECTION:** Relevance. See Motion in Limine.
12. HPD Photo of evidence markers.
13. HPD Photo Evidence Marker 1.
14. HPD Photo Evidence Marker 2.
15. HPD Photo of Dog wide.
16. HPD Photo of Dog close up.
17. 12/20/06 Hartford Police Department Report of Animal Control Officer Jerry Cloutier.
18. Picture of dead St. Bernard (SJ-15)
19. X-rays taken by veterinary center of deceased dog.
20. Redacted Version of Necropsy Report– CT Vet. Medicine Diagnostic Laboratory, UConn
21. Bullet fragments recovered from dog during necropsy
 - a. **OBJECTION:** Relevance. See Motion in Limine.
22. Release of Items Form prepared by UConn Department of Veterinary Science
23. MacDonald Vet Hospital cremation bill
24. K.H. medical records and bills:
 - a. CT Children's Medical Center
 - b. Hartford Hospital
 - c. Institute of Living
 - d. Wheeler Clinic
 - e. Dr. Nancy Eiswirth, PhD (NAE Associates)
 - f. AMR Ambulance
 - g. Summary Exhibit with bill total

25. Hartford PD supplemental incident report from Case 06-31279 by defendant Pia
26. Notice of Intent to Sue to City of Hartford by plaintiff
27. Certified mail receipt re: notice of intent to sue
 - a. **OBJECTION:** Relevance. See Motion in Limine.
28. CV of Dr. Nancy Eiswirth
 - a. **OBJECTION:** Hearsay. See Motion in Limine.
29. Excerpts from Deposition of O'Hare (see listing below)
30. Excerpts from Deposition of Pia (see listing below)
31. Warrant Affidavit for George Hemingway's Arrest by Gabriel Laureano and defendant O'Hare (Version 1) (potential impeachment only)
32. Warrant Affidavit for George Hemingway's Arrest by Gabriel Laureano and defendant O'Hare (Version 2) (potential impeachment only)

B. O'HARE AND PIA'S EXHIBITS

1. These defendants incorporate all of the plaintiffs' exhibits that are not objected to.
2. Picture of North Side of 297 Enfield Street, Hartford, CT.
3. Picture of North Side of 297 Enfield Street, Hartford, CT.
4. Picture of North Side of 297 Enfield Street, Hartford, CT.
5. Picture of North Side of 297 Enfield Street, Hartford, CT.
6. Two Pictures of Front Yard of 297 Enfield Street, Hartford, CT.
7. Two Pictures of Backyard of 297 Enfield Street, Hartford, CT.
8. Picture of Driveway of 297 Enfield Street, Hartford, CT.
9. Picture of Front of 297 Enfield Street, Hartford, CT.
10. Picture of Backyard of 297 Enfield Street, Hartford, CT.
11. Two Pictures of Driveway of 297 Enfield Street, Hartford, CT.
12. Two Pictures of Front and Side Yard of 297 Enfield Street, Hartford, CT.
13. Road diagram in area of 297 Enfield Street.
14. Redacted Aerial Photo 1
15. Redacted Aerial Photo 2
16. Redacted Aerial Photo 3
17. Redacted Aerial Photo 4

C. CITY OF HARTFORD'S EXHIBITS

1. This defendant incorporates all of the plaintiffs' exhibits that are not objected to.
2. Picture of North Side of 297 Enfield Street, Hartford, CT.
3. Picture of North Side of 297 Enfield Street, Hartford, CT.
4. Picture of North Side of 297 Enfield Street, Hartford, CT.
5. Picture of North Side of 297 Enfield Street, Hartford, CT.
6. Two Pictures of Front Yard of 297 Enfield Street, Hartford, CT.
7. Two Pictures of Backyard of 297 Enfield Street, Hartford, CT.

8. Picture of Driveway of 297 Enfield Street, Hartford, CT.
9. Picture of Front of 297 Enfield Street, Hartford, CT.
10. Picture of Backyard of 297 Enfield Street, Hartford, CT.
11. Two Pictures of Driveway of 297 Enfield Street, Hartford, CT.
12. Two Pictures of Front and Side Yard of 297 Enfield Street, Hartford, CT.
13. Road diagram in area of 297 Enfield Street.
14. Redacted Aerial Photo 1
15. Redacted Aerial Photo 2
16. Redacted Aerial Photo 3
17. Redacted Aerial Photo 4

XIII. DEPOSITION TESTIMONY

The plaintiffs intend to offer the following portions of the defendants' depositions:

Defendant Pia:

<u>Page</u>	<u>Lines</u>
26	5-25
27	6-12
40	3-4
58	1-4
70	12-18
72	22-25
73	1-25
74	1-21
75	14-25
76	1

Defendant O'Hare:

<u>Page</u>	<u>Lines</u>
49	21-25
50	1-7
52	2-12
69	3-8
72	24-25
73	1-16
88	23-25
89	1-3
92	17-25
93	1-6, 16-25
94	1-2
97	18-25
98	1-18

99 12-25
106 4-12

The defendants' cross designations are as follows:

Defendant Pia:

<u>Page</u>	<u>Lines</u>
23	7-21
27	13-15
50	24-25
51	1-25
52	1-6
76	2-25
77	1-2

Defendant O'Hare:

<u>Page</u>	<u>Lines</u>
50	18-25
51	1-25
52	1
52	13-25
73	17-25
74	1-13
88	22
92	15-16
93	7-15

The plaintiffs object to the introduction of all of the portions of the defendants' own depositions as hearsay, it improper lay opinion testimony and irrelevant, except for Pia's testimony Page 52, lines 5-6 and O'Hare's testimony Page 73 lines 17-25; Page 74, lines 1-13; and Page 88, lines 22.. See, Fed. R. Evid. 403, 701 and 801-802.

XIV. JURY INSTRUCTIONS

See the parties' agreed upon jury instructions attached as **Exhibit D**. See O'Hare and Pia's proposed jury instructions attached as **Exhibit E**. See Plaintiffs' proposed jury instructions attached as **Exhibit F**.

XV. ANTICIPATED EVIDENTARY PROBLEMS

See Pia and O'Hare's Motion in Limine attached as **Exhibit G**. See Plaintiffs' Motion in Limine attached as **Exhibit H**.

XVI. VERDICT FORM

Plaintiffs do not believe that the defendants are not entitled to have each element of each count set forth as a separate interrogatory before a verdict on any one count is rendered. The plaintiffs claim that such a task would make it overly complicated for the jury and unfair to plaintiffs.

See O'Hare and Pia's proposed verdict form attached as **Exhibit I**. See Plaintiffs' proposed verdict form attached as **Exhibit J**.

XVII. TRIAL TIME

The parties estimate that trial will take approximately 4-6 days.

XVIII. FURTHER PROCEEDINGS

There is no need for any further proceedings prior to trial.

XIX. MAGISTRATE JUDGE

The plaintiffs consent to trial by magistrate. The defendants do not consent to trial by magistrate.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde

Thomas R. Gerarde (ct05640)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

PLAINTIFF,
GLEN HARRIS, P.P.A.
and ANTHONY PIA

By /s/ Jon L. Schoenhorn

Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street
Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri

Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
E-mail: Feoln001@hartford.gov

EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually, and P.P.A :	:	CIVIL ACTION NO.
as guardian for K.H., a minor child,	:	
Plaintiffs,	:	
	:	
V.	:	3:08CV1644 (RNC)
	:	
JOHNMICHAEL O'HARE;	:	
ANTHONY PIA; and	:	
CITY OF HARTFORD, CT	:	
Defendants.	:	DECEMBER 31, 2010

PLAINTIFF'S PROPOSED VOIR DIRE QUESTIONS

The plaintiffs request that prospective jurors be required to identify him or herself, giving their respective juror number, name, address, and occupation for the past five (5) years, and the occupation of their spouses and adult children for the past five years (and last occupation if retired or unemployed). Additionally, the plaintiffs request that the Court ask the following question:.

1. How long have you sat on the panel? What other juries have you been or sat on, and did the jury in those cases reach a verdict?
2. Where do you work? Will you lose income if forced to sit on this case ?
3. Do you have family obligations during the week of _____?
4. Do you have any upcoming vacation plans or medical appointments?
5. Would you be a better juror at a different time?
6. Have you heard or read about this case or any other case or claim of civil rights violations or other misconduct made against the Hartford police department?

If so, what have you heard?

Do you feel that this could affect your ability to fairly hear and decide this case?

7. Do you now own or have you ever owned a dog? What kind?

How do you feel about St. Bernard dogs?

Do you harbor any fear of dogs, whether that fear is fact-based or not?

8. Have you ever made a complaint against someone for trespassing on your property?
9. Do you think police officers are more likely to tell the truth?

10. Do you feel that police are sometimes overzealous in their conduct?
11. Do you have any children? If the answer is yes, please state their age and gender.
12. Do you think that police are unfair to minorities and to African Americans in particular?
13. Have you or has anyone in your family ever worked in law enforcement?
14. Have you or anyone in your family ever worked for a state investigative agency?
15. Do you believe that a person who proves a violation of his or her rights should be compensated for emotional distress when there is no related physical injury?
16. Do you have any resentment against AT&T or its cable subsidiary, U-Verse?
Do you have any preconceived opinions about Mr. Harris because he works for AT&T's cable company, U-Verse?
17. Do you or anyone in your family take part in any activities, including holding a public office, that requires frequent interaction with police officers?
18. Do you believe that persons who own homes in Hartford have less personal privacy than those persons who live in the suburbs?
19. Do you believe police should be able to enter your home or yard without a warrant?
20. Do you or does anyone close to you work at CT Children's Medical Center or the Institute of Living?
21. How do you get your news? Newspaper, TV news, or Internet?
22. Assuming that you reach a verdict for the plaintiff on the issue of liability that is, that you find that the defendant officers were at fault in this case, do you feel you could give the plaintiff a full and fair sum of damages, even in the absence of physical injury?
22. Does anyone here believe that citizens, who have been treated illegally and unfairly by police, should **NOT** have a right to bring a suit against police officers?
23. Do any of you have difficulty with the concept of enforcing the civil rights of the plaintiffs as you would any other rights to which a citizen of this country is entitled?
24. Is there anything about the plaintiffs, or any of their claims, that would make it difficult for you to render a verdict in their favor? If so, please explain your concerns.
25. Do you believe that a person who proves violations of civil rights should be compensated fully for any damages he or she suffers as a result? Does anyone here have any difficulty or disagreement with that concept?

26. If you were selected as a juror in this case, do you know of any reason why you could not sit as an impartial juror?

27. Does anyone here believe that in any disagreement with the actions taken by a police officer, that the edge should be given to the officer because of his role or position?

28. If you were suing the police, would you want someone like yourself on the jury?

The plaintiffs also request that the court allow a limited amount of individual questioning and follow up by counsel.

THE PLAINTIFFS– GLEN HARRIS, et al.

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC.
108 Oak Street
Hartford, CT 06106
(860) 278-3500
Fax: (860) 278-6393
Jon@Schoenhorn.com

EXHIBIT B

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JANUARY 7, 2011

O'HARE AND PIA'S PROPOSED VOIR DIRE QUESTIONS

1. The plaintiff in this case is GLEN HARRIS. To the best of your knowledge, are you or any member of your family acquainted with the plaintiff or any of his family members in any way? If so, please describe the nature of the acquaintance.

2. The defendants in this case are Hartford Police Officers JOHNMICHAEL O'HARE and ANTHONY PIA. To the best of your knowledge, are you or any member of your family acquainted with the defendants? If so, please describe the nature of the acquaintance.

3. Have you or any member of your family or friends ever been represented by, socially acquainted with or related to any of the attorneys involved in this action? If so, state when you were represented by the attorney and in what type of matter, or the nature of the relationship with the attorney.

4. Please state whether you know, or are acquainted with any of the witnesses personally. If so, please describe your relationship.

5. Please state whether you or any member of your family has been a party to a lawsuit. If so, please describe the circumstances.

6. Have you ever been involved in a civil or criminal case as a witness?

7. Have you had prior jury service? If so, please state whether the matter was in federal or state court, a civil or criminal case, the nature of the case, whether you reached a jury verdict, and if so, what was the verdict?

8. Do you have any knowledge about the circumstances surrounding this lawsuit, either personally, through the media or otherwise?

9. Have you, a member of your family, or a close friend ever sued a police officer of any municipality, the State of Connecticut or any municipality for any reason?

10. To the best of your knowledge, have you, a member of your family, or a close friend ever had a negative experience with a police officer? If so, please describe the nature of such experience.

11. Do you have a favorable or unfavorable opinion about police officers?

12. Have you, a member of your family, or a close friend ever been arrested?

13. Have you ever been the subject of a dispute which resulted in the police being called to the scene? If so, please describe.

14. Do you have an opinion, favorable or unfavorable, about the City of Hartford? The Hartford Police Department?

15. Have you or a member of your family ever been employed as a police officer?

16. Have you or a member of your family ever been employed by the City of Hartford, or any other municipality? If so, in what capacity?

17. If you are selected to sit on this jury, the Court will instruct you on the law which you must apply to the facts of this case as you find them to be. One of the Court's instructions will inform you that the burden of proof for all material facts rests

with the plaintiff. Do you understand that it is the plaintiff's responsibility to prove every fact essential to his case?

18. Is there any reason why you could not or would not be able to send the plaintiff away without money damages if you feel that the plaintiff has not sustained his responsibility to prove his case against the defendants even though he claims to have suffered injuries and incurred expenses?

19. If you are selected to sit on this jury, the Court will instruct you that you must put aside all natural feelings of sympathy during deliberations and decide this case solely on the facts and the law. Is there any reason why you could not or would not be able to do so?

20. Is there any reason why you could not or would not treat Hartford Police Officers JOHNMICHAEL O'HARE and ANTHONY PIA as fairly, impartially and justly as you would treat any other individual?

21. Do you believe that a person is entitled to an award of damages merely because they have hired an attorney and filed a lawsuit for money damages?

22. Do you believe that a defendants must have done something wrong or are otherwise legally at fault merely because they have been sued?

23. Do you know of any reason why you could not serve as a juror in this case?

24. Do you own, or have you ever owned, a dog? If so, please indicate how many dogs, their breed and whether any of those dogs died from unnatural causes?

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on January 7, 2011, a copy of the foregoing Proposed Voir Dire was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

EXHIBIT C

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JANUARY 7, 2011

CITY OF HARTFORD'S PROPOSED VOIR DIRE QUESTIONS

1. Have you, any member(s) of your family or any close friends ever sued or made a claim for damages against the police?
2. Have you, any member(s) of your family or any close friends ever made any formal complaint against a police officer?
3. Have you, any member(s) of your family or any close friends been involved in what you consider to be a negative or unpleasant situation with the police?
4. Do you feel that your previous involvement in any of these situations would be likely to affect your ability to be completely objective and impartial in this case?
5. Have any of you ever served on a jury which heard claims of police misconduct or violation of constitutional rights?
6. Have any of you heard or read anything about the Hartford Police Department or its officers, or heard or read anything about police officers in general, which would in any way interfere with your ability to be completely objective and impartial concerning the evidence of this case?

7. Do any of you have any strong opinions, ideas or thoughts about claims of deprivation of constitutional rights such as are involved in this case as I have outlined it to you? If so, would you please describe?
8. Would any of your feelings or ideas concerning claims similar to the ones before us today as I have described them to you prevent you from being absolutely fair and impartial in considering this case solely on the basis of the evidence and the law as the court will give it to you?
9. If the court were to instruct you that the law applicable to this case could result in your having the duty to send the plaintiff away with no recovery, would you have any difficulty in making that decision?
10. In considering this case, would you be able to put aside any feeling of sympathy you may have for the plaintiff, and decide this case solely on the basis of the evidence and the law as the Court will give it to you?
11. Have you or any one you know ever been personally injured by a police officer?
12. Have you, or any member of your family, ever been employed by the City of Hartford? If so, in what position and department were you, or your family member, employed?
13. How many years were you, or your family member, employed there? Are you, or your family member, still employed there? If not, why not?
14. Have you, or any member of your family ever applied to work for the City of Hartford? If you or your family member were not hired, state the reasons why not. Do you believe that that experience will prevent you from acting as a fair and impartial juror in this case if selected?

15. Do you, or any member of your family know, or have you or they had dealings with employees of the Hartford Police Department?
16. Have you ever had any contact with the City of Hartford Police Department including individual members of the department?
17. Have you or anyone close to you ever been arrested for reasons that you or they considered to be unfair? If so, please explain.
18. Do you have any strong personal feelings about the City of Hartford? If so, what are those feelings?
19. Do you have any strong personal feelings about police officer, or municipal employees or administrators?
20. Have you, or any member of your family, ever filed suit against another person? If so, do you have any personal feelings about the judicial process that may impact on your ability to be fair and impartial as a juror in this case?
21. Do you know any of the other people seated in the expanded jury box with you before today? If so, how do you know that person? Also, could this fact have any impact on your ability to be fair and impartial as a juror in this case?
22. Does any member of the panel believe that if one party sues another party, he or she should at least get something for having brought the lawsuit?
23. Does any member of the panel have any preconceived ideas concerning civil rights litigation that would cause you not to have a free and open mind in the case? What are those preconceived ideas?

24. At the end of a trial, the court instructs the jury on certain matters of law. Is there anyone here who could not – for any reason – apply the law as the court explains it, even though you may not agree with the law?
25. As a juror, you will be called upon to work as a team to render a verdict. Can you think of any reason why you could not do that?
26. The Plaintiff in this case has the burden of proving his case and that is why he gets to go first. Will you wait until all the evidence is in before you make a decision as to what happened in this case?
27. If the plaintiff fails to prove each and every element of his case by a preponderance of the evidence, would you be able to send him away with no money? In other words, simply because he has taken the time to bring the lawsuit which he fails to sustain, could you send him away with no compensation?
28. In rendering a verdict in this case, the judge will tell you that you cannot speculate. While you may make inferences from the evidence, your conclusions can only be based on the evidence in court. Can you follow that instruction?
29. Do you have any reason to believe that you could not serve as a fair and impartial juror in this case?

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
E-mail: Feoln001@hartford.gov

CERTIFICATION

This is to certify that on January 7, 2011, a copy of the foregoing Proposed Jury Instructions was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Alan R. Dembiczak
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921

/s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri

EXHIBIT D

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. : NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child :
 :
 :
v. :
 :
 :
JOHNMICHAEL O'HARE, :
ANTHONY PIA, and :
CITY OF HARTFORD : JANUARY 7, 2011

PARTIES' AGREED UPON JURY INSTRUCTIONS

THE TRESPASS CLAIM

1. The complaint alleges that the defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so and their actions constituted a trespass under Connecticut law.

2. Under Connecticut common law, the essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing injury.

THE CONVERSION CLAIM

3. The complaint alleges that the defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog deprived the plaintiff of his property, a beloved family pet, resulting in damages - conversion.

4. To establish a claim for conversion, a plaintiff must show that: (1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property before its conversion; and (3) defendant

exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights. The tort of conversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights. In addition, conversion requires that the owner or his property be harmed as a result of the unauthorized act.

5. However, a conversion occurs only if the officers' actions were unauthorized.

THE NEGLIGENCE CLAIM

6. The complaint alleges that O'Hare and Pia were negligent in entering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property. The plaintiff's complaint alleges that the defendants were negligent in that they should have been aware of a substantial and unjustifiable risk that their conduct would violate plaintiff's rights.

Negligence Elements

7. The plaintiffs have claimed that the defendants' negligence caused their injuries. The complaint alleges that O'Hare and Pia were negligent in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

8. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property. Common-law

negligence is a violation of the duty to use reasonable care under the circumstances. A violation of either of these duties is negligence. Common-law negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would use in the same circumstances.

9. In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendants at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

10. To establish his claim of negligence the plaintiffs must prove four elements: duty; breach of that duty; causation; and actual injury. If a plaintiff cannot prove all of those elements, the cause of action fails.

11. **Authority:** Sharkey v. Skilton, 83 Conn. 503, 508 (1910); Guglielmo v. Klausner Supply Co., 158 Conn. 308, 318 (1969); Hoelter v. Mohawk Services, Inc., 170 Conn. 495, 501 (1976); Angiolillo v. Buckmiller, 102 Conn.App. 697, 711, *cert. denied*, 284 Conn. 927 (2007); Jagger v. Mohawk Mountain Ski Area, Inc., 269 Conn. 672, 687 n. 13 (2004); D'Angelo Development & Construction Corp. v. Cordovano, 121 Conn.App. 165, 184 (2010); Galligan v. Blais, 170 Conn. 73, 77 (1976); Pleasure Beach Park Co. v. Bridgeport Dredge & Dock Co., 116 Conn. 496, 503 (1933); Geoghegan v. G. Fox & Co., 104 Conn. 129, 134 (1926).

Duty

12. A duty to use care exists when a reasonable person, knowing what the defendants here either knew or should have known at the time of the challenged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable.

13. In describing the duties involved in this case, I have used the term "reasonable care." Reasonable care is defined as the care which an ordinarily prudent or careful person would use in view of the surrounding circumstances. You must determine the question by placing an ordinarily prudent person in the situation of the defendant and ask yourselves: what would such a person have done? Note that it is the care that such a person would have used under the surrounding circumstances, that is, in view of the facts known or the facts of which the party should have been aware at the time. The standard of care required, that of an ordinarily prudent person under the circumstances, never varies, but the degree or amount of care may vary with those circumstances. For example, in circumstances of slight risk or danger, a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of greater risk or danger, a correspondingly greater amount of care would be required to constitute reasonable care.

14. **Authority:** Coburn v. Lenox Homes, Inc., 186 Conn. 370, 375 (1982); Pisel v. Stamford Hospital, 180 Conn. 314, 332-33 (1980); Orlo v. Connecticut Co., 128 Conn. 231, 237 (1941).

Causation

15. Next, the plaintiffs must prove that the defendants' breach of duty was the cause of his injuries. In order to prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries, that is, that the conduct both caused the injury in fact and proximately caused the injury. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. The test of proximate cause is whether the defendant's conduct is a substantial factor in producing the plaintiff's injury.

16. If you find that the defendants were negligent in any of the ways alleged in the plaintiffs' complaint, you must next decide if such negligence was a legal cause of any of the plaintiff's claimed injuries. Legal cause has two components: cause in fact and proximate cause. Negligence is a proximate cause of an injury if it was a substantial factor in bringing the injury about. More specifically, negligence is a substantial factor in bringing about an injury if it contributes materially to the production of the injury. Negligence contributes materially to the production of an injury if its causative effects remain in active operation until the moment of injury, or at least until the setting in motion of the final active injurious force which immediately produces or precedes the injury. By this definition, negligence which makes only a remote, a trivial or an inconsequential contribution to the production of an injury is not a substantial factor in bringing about the injury, and thus is not a proximate cause of the injury.

17. **Authority:** Craig v. Driscoll, 262 Conn. 312, 330 (2003). Lodge v. Arett Sales Corp., 246 Conn. 563, 574 (1998); Doe v. Manheimer, 212 Conn. 748, 757-58 (1989); Ferndale Dairy, Inc. v. Geiger, 167 Conn. 533, 538 (1975); Paige v. St. Andrew's Roman Catholic Church Corp., 250 Conn. 14, 25-26 (1999).

THE RECKLESSNESS CLAIM

18. The plaintiffs have also alleged that the officers were reckless. The complaint alleges that O'Hare and Pia were reckless in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

19. Recklessness is a state of consciousness with reference to the consequences of one's acts. It is more than negligence, more than gross negligence. The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Wanton misconduct is reckless misconduct. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. Willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.

20. **Authority:** Craig v. Driscoll, 262 Conn. 312, 342 (2003).

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde (ct05640)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

PLAINTIFF,
GLEN HARRIS, P.P.A.
and ANTHONY PIA

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street
Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

EXHIBIT E

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA, and CITY OF HARTFORD	:	JANUARY 7, 2011

O'HARE AND PIA'S PROPOSED JURY INSTRUCTIONS

BACKGROUND / GOVERNING LAW

1. You are going to be considering the plaintiff's claims against three defendants, namely the City of Hartford, Officer John Michael O'Hare and Officer Anthony Pia. You must decide the case against each named defendant separately. You must not be influenced in deciding the claim against one defendant, by the claims against another, nor by your decision as to another defendant. While the evidence may, in whole or in part, be considered by you to be relevant and material to the question of more than one defendant's liability, you must decide each claim of liability based on the proof of the claims essential to recovery against each defendant separately.

2. Plaintiff's federal claims against the defendants are brought under a section of the federal law, 42 United States Code, Section 1983, which is known as the "Civil Rights Act," which provides, in relevant part, as follows: "Every person who, under color of any statute, ordinance, regulation, custom of usage of any State, subjects or causes to be subjected, any citizen of the United States, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

3. This statute provides that any person may sue for relief in the form of money damages against a person or persons, who, acting under color of law, statute, ordinance, regulation or custom, deprives a plaintiff of any rights, privileges or immunities secured or protected by the Constitution or the laws of the United States. In order to prove his Section 1983 claim, the plaintiff must establish, by a preponderance of the evidence, each of the following elements:

4. One, that defendants acted under color of the authority of the State of Connecticut; two, that the defendants performed acts which deprived the plaintiff of his constitutional rights; and three, that such acts as you find violated the plaintiff's rights, if you find such, were the legal or proximate cause of damages sustained by the plaintiff.

5. It is not necessary that the plaintiff prove that defendants had a specific intent to deprive her of her civil rights. The plaintiff is entitled to relief if a defendant's acts were intended or were reckless, and if you find that such acts violated the plaintiff's constitutional rights. However, mere negligent conduct is never a basis for finding liability on a constitutional claim.

6. An act of an official is done "under color of authority" or "under color" of state law, if the act is done while the person is actually performing the state duties. There is no dispute in this case but that each defendant was acting "under color" of state law. Remember, the plaintiff must next prove what acts of defendants caused her to suffer the loss of a constitutional right.

FOURTH AMENDMENT

7. The complaint alleges that defendant O'Hare, while illegally remaining on the plaintiff's property, unlawfully seized the plaintiff's dog in violation of 42 U.S.C.

Section 1983 and the Fourth Amendment to the United States Constitution. The defendants allege that their entry into the property was justified as the plaintiffs did not have a legitimate expectation of privacy in the area the officers entered and the dog posed an imminent threat to the officers.

8. The Fourth Amendment states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

ENTRY INTO THE PROPERTY

9. The Fourth Amendment protects people, not places. Fourth Amendment protection requires that a person possess a legitimate expectation of privacy in the area searched. A Fourth Amendment “search,” does not occur unless the search invades an objector area where one has a subjective expectation of privacy that society is prepared to accept as objectively reasonable. In this regard, the home or an individual's “dwelling place” has been afforded a “heightened privacy interest.”

10. The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy. The place searched is highly relevant to the Fourth Amendment analysis because expectations of privacy in some places are afforded greater constitutional legitimacy than in others. An individual may not legitimately demand privacy for activities conducted out of doors in fields.

11. The Second Circuit has noted that the route which any visitor to a residence would use is not private in the Fourth Amendment sense. Similarly, a visual

observation of an object already exposed to public view is no search at all. No Fourth Amendment search occurs when an officer enters a home's driveway, walkway, porch, track of lawn used to reach the stairway or similar area that is accessible to the general public.

12. **Authority:** Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir.1985); United States v. Chadwick, 433 U.S. 1, 7 (1977)); Illinois v. Caballes, 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); California v. Ciraolo, 476 U.S. 207, 211 (1986); Katz v. United States, 389 U.S. 347, 360 (1967)); State v. Mooney, 218 Conn. 85, 94-95, *cert. denied*, 502 U.S. 919 (1991); Oliver v. United States, 466 U.S. 170, 178 (1984); United States v. Reyes, 283 F.3d 446, 465 (2d Cir.2002); Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(e), at 499 (3d ed.1996)); Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir.2004); Krause v. Penny, 837 F.2d 595, 597 (2d Cir.1988); United States v. Titemore, 437 F.3d 251, 259-60 (2d Cir.2006); Serby v. Town of Hempstead, No. 04-CV-901 (DRH)(MLO), 2006 WL 2853869, at *8 (E.D.N.Y. Sept. 30, 2006).

13. The heightened privacy interest afforded to a dwelling place extends to the “curtilage”, which has been described as an “area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life.” The law distinguishes between the curtilage-the land immediately surrounding the home and, thus, considered a part of it-which is entitled to Fourth Amendment protection, and the land outside the curtilage, which, though it might be on the same private property, is not so protected.

14. The concept of curtilage, unfortunately, evades precise definition.

Curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

15. The extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. The central component of this inquiry is whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life. The factors you must consider are: (1) the area's proximity to the main residence; (2) any enclosure of the property or area; (3) use of the property or area; and (4) steps taken to protect the property or area from view.

16. The definition of curtilage is based upon the particular premises and factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself, with a special focus on whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.

17. An individual must take affirmative steps to protect his privacy in his curtilage and his open fields-the real property beyond his curtilage. Government does conduct a search when it intrudes onto open fields that a reasonable person would expect to be private. Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private. The yard in close proximity to house is not

part of curtilage where it is exposed to public view and no evidence that intimate activities associated with domestic life occurred there.

18. The extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. The Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable.

19. **Authority:** Oliver v. United States, 466 U.S. 170, 180 (1984); United States v. Schuster, 775 F.Supp. 297, 306 (W.D.Wis.1990); United States v. Dunn, 480 U.S. 294, 300 (1987); Hester v. United States, 265 U.S. 57, 59 (1924); United States v. Basile, 569 F.2d 1053, 1056 (9th Cir.1978); United States v. Shroyer, 1998 WL 1585819, at *3 (S.D.Ohio 1998); California v. Ciraolo, 476 U.S. 207, 212 (1986); Boyd v. United States, 116 U.S. 616, 630 (1886); United States v. Reilly, 76 F.3d 1271, 1275 (2d Cir.1996); United States v. Titemore, 437 F.3d 251, 258 (2d Cir.2006); State v. Costin, 168 Vt. 175, 182 (1998); State v. Hall, 168 Vt. 327, 331 (1998); State v. Kirchoff, 156 Vt. 1, 10 (1991); Simko v. Town of Highlands, 276 Fed.Appx. 39, 2008 WL 1925143 C.A.2 (N.Y.); United States v. Reyes, 283 F.3d 446, 466-67 (2d Cir.2002); United States v. Williams, 219 F.Supp.2d 346, 360 (W.D.N.Y.2002); United States v. Hogan, 122 F.Supp.2d 358 (E.D.N.Y.2000).

20. There is no “mechanistic application” of any one factor. The central component of the curtilage question remains whether the area harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.

21. The distance between the residence and the area searched is only the beginning of the court's inquiry because the setting where the residence is located affects the analysis. Distance is just one of many factors to be weighed when determining the reach of the curtilage. The "touchstone" inquiry is whether a person had a reasonable expectation of privacy in the area searched. However, in a modern urban multifamily apartment house, the area within the curtilage is necessarily much more limited than in the case of a rural dwelling subject to one owner's control. No court has ever held that all areas within a parcel of residential property are proximate to the residence and thus curtilage.

22. There is no bright-line fence rule. While fencing configurations are important factors in defining curtilage, the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home. In analyzing the enclosure factor, the features of the property must be viewed in consideration of the context of the entire property. The nature of the area observed, its proximity to one's home, the extent of surrounding trees and shrubs, and the general setting of the area within the larger context of the total property are all relevant in assessing the reasonableness of an expectation of privacy.

23. A front lawn that is visible from the street and a porch that constitutes part of a principal entranceway has a diminished expectation of privacy. When a police officer enters private property for a legitimate law enforcement purpose and embarks only upon places visitors could be expected to go, observations made from such vantage points are not covered by the Fourth Amendment.

24. Despite some type of enclosure, a Fourth Amendment violation does not occur if the area in question is open to or used by visitors. There is no reasonable expectation to keep visitors out when a gate is left open in an urban neighborhood. Also, police entry through an open gate does not violate Fourth Amendment because the officers could reasonably believe that the gate provided the principal means of access to the apartment. Further, no Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways. Areas such as driveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interior of the house.

25. Under the actual use test, the courts must consider the actual intimate and private use made of the property. There must be some evidence that the area in question was used for intimate purposes that one might ordinarily conduct inside of one's home. A finding of curtilage cannot be supported absent evidence in the record that the area was designated and used for other intimate purposes that one might ordinarily conduct inside of one's home.

26. What a person chooses voluntarily to expose to public view loses its Fourth Amendment protection. Thus, any expectation of privacy in such an area is objectively unreasonable. In examining the existence of a barrier on the property, the main issue is to determine the extent that the barrier obstructs one's view.

27. Fencing that serves only as a physical barrier and does not in any way restrict the line of sight between the plaintiff's yard and that of his neighbor's, weighs against an expectation of privacy. Rear areas of one's property that are freely

observable to the public and/or neighbors, diminishes one's expectation of privacy. The extent to which an area is visible to the public weighs heavily in determining curtilage. A route along the driveway that is in full view of the street is outside of the curtilage. The fact that the side yards of two residences are narrow and contiguous to each other are highly relevant in determining expectation of privacy.

28. **Authority:** United States v. Titemore, 437 F.3d 251, 258 (2d Cir. 2006); United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996); United States v. Van Dyke, 643 F.2d 992, 994 (4th Cir. 1981); United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980); United States v. Hayes, 551 F.3d 138, 147-48 (2d Cir. 2008); United States v. Lace, 669 F.2d 46, 56 (2d Cir. 1982); United States v. Moffitt, No. 06-10032, 2007 WL 1814123, at *1 (5th Cir. June 22, 2007); United States v. Thomas, 120 F.3d 564, 571-72 (5th Cir. 1997); United States v. Taylor, 90 F.3d 903, 908-09 (4th Cir. 1996); United States v. Reyes, 283 F.3d 446, 465 (2d Cir. 2002); United States v. Reed, 733 F.2d 492, 501 (8th Cir. 1984); Krause v. Penny, 837 F.2d 595, 597 (2d Cir. 1988); Esmont v. City of N.Y., 371 F. Supp. 2d 202, 212 (E.D.N.Y. 2005); Fla. v. Riley, 488 U.S. 445, 452 (1989); Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir. 2004); United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997); Rakas v. Ill., 439 U.S. 128, 152 (1978).

29. Also, a policeman who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee. In fact, if the conditions for the exercise of a public duty exist, the occupier would not be privileged to exclude the officer. It has long been held that a police officer who makes such an entry onto private property, in the course of performing his official duties, is a licensee.

30. **Authority:** Roberts v. Rosenblatt, 146 Conn. 110 (1959); Haffey v. Lemieux, 154 Conn. 185 (1966); Wroniak v. Ayala, Superior Court, judicial district of Hartford, Docket No. 94 0544499 (June 13, 1995, Sheldon, J.); Furstein v. Hill, 218 Conn. 610, 615 (1991); State v. Plummer, 241 A.2d 198 (1967); State of Connecticut v. Alexander, Superior Court of Connecticut, Judicial District of Fairfield. No. CR060215063 (June 3, 2008, Hauser, J.)

THE KILLING OF THE DOG

31. Courts have consistently recognized that a law enforcement officer's killing of a dog constitutes a destruction of the owner's property and therefore a seizure under the Fourth Amendment. However, the government retains a strong interest in allowing law enforcement officers to protect themselves and the citizenry from animal attacks. Thus, no unreasonable seizure will be found where an officer has killed a dog that posed an imminent threat. Where the dog is displaying aggressive or threatening behavior toward an officer, such behavior can be deemed an imminent threat. Also a dog approaching an officer quickly and coming within close proximity to the officer while exhibiting threatening behavior can constitute an imminent threat justifying the killing of the dog.

32. **Authority:** San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 975 (9th Cir.2005); Altman v. City of High Point, 330 F.3d 194, 205 (4th Cir.2003); Hatch v. Grosinger, 2003 WL 1610778 (D.Minn.2003); Warboys v. Officer Proulx, 303 F.Supp.2d 111, 118 (D.Conn.2004).

QUALIFIED IMMUNITY

33. I have now completed my instructions to you on the elements of plaintiff's Section 1983 claim. If you find that the plaintiff has proven the elements of his Section 1983 claim against a defendant, you must proceed to consider whether the defendant is entitled to what the law calls "qualified immunity" for each claim that the plaintiff has proved.

34. A particular defendant will be entitled to qualified immunity if, at the time of the conduct complained of, he should have known that his conduct was contrary to clearly established federal law.

35. The defendant whom you are considering has the burden of demonstrating that his conduct did not violate the clearly established federal law about which I have instructed you. A particular defendant is entitled to qualified immunity only if a reasonable police officer in defendant's position would not have been expected at the time to know that his conduct violated clearly established federal law.

36. In deciding what a reasonable officer should have known about the legality of his conduct, you may consider the nature of that defendant's official responsibilities, the information that was known to the defendant or not known to him at the time of the incident in question, and the events that confront him.

37. Qualified immunity is an affirmative defense. Having claimed insulation from liability on the basis of qualified immunity, it is defendants' burden of proving the elements of that defense by a preponderance of the evidence. The elements required to be proven are: One, that their conduct was within the scope of their duties; two, that their conduct was not violative of constitutional rights clearly established at the time of

their conduct. A defendant is entitled to the absolute defense if, in the performance of his duties, as would a reasonably objective police officer, he had an objectively reasonable belief that there was probable cause that plaintiff committed the offense charged.

38. **Authority:** Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir.2004); Boyd v. New York, 336 F.3d 72, 76 (2d Cir.2003); Pearson v. Callahan, 129 S.Ct. 808, 815 (2009) *citing* Groh v. Ramirez, 540 U.S. 551, 567 (2004); Butz v. Economou, 438 U.S. 478, 507 (1978).

39. Thus, you must ask yourself what a reasonable officer in the particular defendant's situation would believe about the legality of his conduct. If you find that a reasonable officer in the defendant's situation would have believed that his conduct was lawful, the official is protected from liability by qualified immunity.

40. To summarize, if the defendant whom you are considering convinces you by a preponderance of the evidence that his conduct did not violate clearly established federal law on a particular claim, then you must return a verdict for that defendant on that claim. This is so even though you may have previously found that the defendant in fact violated the plaintiff's federally protected rights. If you find that the defendant has not proved that he is entitled to qualified immunity on a particular claim, then you should proceed to consider the issue of damages.

41. **Authority:** 42 U.S.C 1983; Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 77 USLW 4068 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Saucier v. Katz, 533 U.S. 194, 200-01 (2001); Lennon v. Miller, 66 F.3d 416, 422 (2d Cir. 1995); Anderson v. Creighton, 483 U.S. 635, 641 (1987); Anderson v. Branen, 17 F.3d 552,

557 (2d Cir. 1994); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982); Graham v. Connor, 490 U.S. 386, 394, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989); Conn. Gen. Stat. 53a-23.

42. Therefore, you must determine if it was objectively reasonable for the officers to believe that the area of plaintiffs' yard they entered was not "curtilage" and their entry was not a Fourth Amendment search. You must also determine if it was objectively reasonable for O'Hare to believe that the dog posed an imminent threat.

SUBSTANTIVE DUE PROCESS

43. The Due Process Clause of the Fourteenth Amendment maintains that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause guarantees more than fair process; it covers a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them. Substantive due process, the most general of the Due Process protections, is often identified within the context of protecting certain fundamental rights (e.g., bodily integrity, marriage, procreation), or protecting individuals from other arbitrary government behavior so brutal and so offensive to human dignity that it "shocks the conscience of the court.

44. However, not all wrongs perpetrated by a government actor violate due process. In order to prevail on a substantive due process claim, the plaintiff must first establish the existence of a federally protectable property right, which requires a demonstration of a clear entitlement to a benefit under state law. Substantive due process has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm that our Nation, built upon

postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. Thus, substantive due process has been held to safeguard such intimate activities as marriage; contraception; education of children; and bodily integrity.

45. Second, a plaintiff must also demonstrate that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. A plaintiff must show not just that the action was literally arbitrary, but that it was arbitrary in the constitutional sense. Mere irrationality is not enough: only the most egregious official conduct, conduct that shocks the conscience, will subject the government to liability for a substantive due process violation based on executive action.

46. The protections of substantive due process are available only against egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience. The test of what shocks the conscience is not precise and it also varies depending on the factual context. Malicious and sadistic abuses of power by government officials, intended to oppress or to cause injury and designed for no legitimate government purpose, unquestionably shock the conscience. On the other hand, overzealous or erroneous government action alone does not give rise to a constitutional violation.

47. In one Connecticut case, the court found that a police officer's shooting and killing of dog owner's pitbull, which escaped from residence and ran towards the officer, was reasonable conduct that did not shock the conscience. It was determined that the officer's conduct was objectively reasonable because the pitbull weighed between 90 and 100 pounds, traveled distance of approximately 30 feet in five seconds, and would have reached officer in one and one-half seconds or less.

48. **Authority:** County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998); Albright v. Oliver, 510 U.S. 266, 272 (1994); Rochin v. California, 342 U.S. 165, 172, 174 (1952); Smith ex rel. Smith v. Half Hollow Hills Cent. School Dist., 298 F.3d 168, 173 (2d Cir.2002); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965); Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923); ATC Partnership v. Windham, 251 Conn. at 597, 606 (1999); Benzman v. Whitman, 523 F.3d 119, 126 (2d Cir.2008); Velez v. Levy, 401 F.3d 75, 93 (2d Cir.2005); United States v. Salerno, 481 U.S. 739, 746 (1987); O'Connor v. Pierson, 426 F.3d 187, 203 (2d Cir.2005); Smith v. Half Hollow Hills Central School, 298 F.3d 168, 173 (2d Cir.2002); Arnone v. Connecticut Light & Power Co., 90 Conn.App. 188, 201-03 (2005); Eichenlaub v. Township of Indiana, 385 F.3d 274, 285 (3d Cir.2004), *cert. denied* 128 S.Ct. 201 (2007); Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 252 (2d Cir.2001); Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir.1994); Warboys v. Proulx, 303 F.Supp.2d 111 (D.Conn.,2004).

QUALIFIED IMMUNITY

49. You must also determine if the officers are entitled to qualified immunity on the plaintiffs' substantive due process claim. You must determine if it was objectively reasonable for an officer in O'Hare's position to believe that his actions were not violative of due process. You must determine if it was objectively reasonable for an officer in O'Hare's position to believe that his actions were not so egregious, so outrageous, that they shocked the contemporary conscience.

50. **Authority:** 42 U.S.C 1983; Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 77 USLW 4068 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Saucier v. Katz, 533 U.S. 194, 200-01 (2001); Lennon v. Miller, 66 F.3d 416, 422 (2d Cir. 1995); Anderson v. Creighton, 483 U.S. 635, 641 (1987); Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982); Graham v. Connor, 490 U.S. 386, 394, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989); Conn. Gen. Stat. 53a-23.

FAILURE TO INTERVENE

51. The complaint alleges that Pia failed to prevent O'Hare from unlawfully shooting the plaintiff's dog. Now, if you have already concluded that the entry into the killing of the dog was justified, you need not consider whether Pia had a duty to intervene.

52. An officer may be legally responsible if, while in a position to intervene but failed to do so. However, an officer cannot be held liable for failure to intercede unless such failure permitted fellow officers to violate the plaintiff's clearly established rights, and unless the failure to intercede occurred in circumstances in which it was objectively

unreasonable for him to believe that his fellow officers' conduct did not violate those rights. Objectively unreasonable means that all reasonable officers, in the position of the defendants, would have to intervene. Put another way, objectively unreasonable means no reasonable officer could believe the conduct was lawful. If you conclude that reasonable officers could disagree whether the officers' conduct was appropriate, you must find for the defendants on this issue.

53. To say it another way, you may only find that the defendants failed to intervene if they knew or should have know that the entry into the property and killing of the dog was not justified, **and**, that each defendant had a reasonable opportunity to intervene under the circumstances then and there existing. If you conclude that reasonable officers could disagree about whether the entry into the property and killing of the dog was justified or reasonable officers could disagree about whether or not they could have intervened, you must find for the defendants. In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring

54. **Authority:** Ricciuti v. N.Y. City Transit Auth., 124 F.3d 123, 129 (2d Cir.1997); O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir.1988); Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1992).

55. Therefore, you must determine if a reasonable person in Pia's position would not have known that the plaintiffs' constitutional rights were being violated. Also, you must determine if Pia had a realistic opportunity to intervene.

THE CONNECTICUT CONSTITUTION CLAIM

56. Since the plaintiffs have adequate alternative remedies based upon existing claims under both the Fourth and Fourteenth Amendments to the United States Constitution, a cause of action cannot be inferred to exist under the Connecticut Constitution. Therefore, this is no viable cause of action in this case pursuant to the Connecticut Constitution.

57. **Authority:** Binette v. Sabo, 244 Conn. 23 (1998); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314, 334-38 (1993); ATC Partnership v. Windham, 251 Conn. 597, 613-14 (1999).

THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

58. The plaintiffs have also pled a claim for intentional infliction of emotional distress. In order to recover damages on a claim for intentional infliction of emotional distress it must be shown: (1) that the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress and (4) that the emotional distress sustained by the plaintiff was severe.

59. Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the

recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" Conduct that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

60. Extreme and outrageous conduct is conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. The standard in Connecticut to demonstrate extreme and outrageous conduct is stringent. Mere insults, indignities, or annoyances that are not extreme and outrageous will not suffice. The Defendants' conduct cannot be merely rude, tactless or insulting. Conduct that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

61. However, Connecticut does not allow recovery for intentional or negligent infliction of emotional distress resulting from an injury solely to property. Connecticut law never recognized a right to sue an individual for intentional or negligent infliction of emotional distress resulting from injury to such property as a pet. There is no law in Connecticut that allows plaintiffs to recover noneconomic damages resulting from a defendant's alleged negligent or intentional act resulting in the death of a pet.

62. **Authority:** Petyan v. Ellis, 200 Conn. 243, 253 (1986); Carrol v. Allstate Ins. Co., 262 Conn. 433, 442-43 (2003); Appleton v. Board of Education, 254 Conn. 205, 210-11 (2000); Bell v. Board of Education, 55 Conn.App. 400, 410 (1999); Tracy v. New Milford Public Schools, 101 Conn.App. 560, 569, *cert. denied*, 284 Conn. 910 (2007); DeLaurentis v. New Haven, 220 Conn. 225, 267 (1991); W. Prosser & W.

Keeton, Torts (5th Ed.1984), §12, p. 60; Ancona v. Manafort Bros., Inc., 56 Conn.App. 701, 712 (2000); Russo v. City of Hartford, 184 F.Supp.2d 169, 188 (D.Conn.2002); Brown v. Ellis, 40 Conn.Supp. 165, 167 (Conn.Super.Ct.1984); Garris v. Dep't of Corr., 170 F.Supp.2d 182, 189 (D.Conn.2001); Daniels v. City of New Haven, 2008 WL 5481703, Superior Court of Connecticut, CV-01-0451523-S (December 03, 2008, Cronan, J.); Delco v. Reed, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 99 0172435 (January 3, 2000, Hickey, J.); Myers v. Hartford, 84 Conn.App. 395, 402, *cert. denied*, 271 Conn. 927 (2004); Bose v. Lewis, Superior Court of Connecticut, Judicial District of New London No. 4101451 (Dec. 14, 2005, Devine, J.); Coston v. Reardon, Superior Court of Connecticut, No. 063892 (Oct. 18, 2001).

THE TRESPASS CLAIM

63. The complaint alleges that the defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so and their actions constituted a trespass under Connecticut law.

64. Under Connecticut common law, the essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury. However, a policeman who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee. In fact, if the conditions for the exercise of a public duty exist, the occupier would not be privileged to exclude the officer. It has long been held that a

police officer who makes such an entry onto private property, in the course of performing his official duties, is not a trespasser but a licensee.

65. **Authority:** City of Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 87 (2007); 38 Am.Jur., Negligence, s 124; 2 Harper & James, Torts s 27.14 n. 21; U.S. v. St. Clair, 240 F.Supp. 338 (D.C.N.Y. 1965); Roberts v. Rosenblatt, 146 Conn. 110 (1959); Haffey v. Lemieux, 154 Conn. 185 (1966); Wroniak v. Ayala, Superior Court, judicial district of Hartford, Docket No. 94 0544499 (June 13, 1995, Sheldon, J.); Furstein v. Hill, 218 Conn. 610, 615 (1991); State v. Plummer, 241 A.2d 198 (1967); State of Connecticut v. Alexander, Superior Court of Connecticut, Judicial District of Fairfield. No. CR060215063 (June 3, 2008, Hauser, J.)

THE CONVERSION CLAIM

66. The complaint alleges that the defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog deprived the plaintiff of his property, a beloved family pet, resulting in damages - conversion.

67. To establish a claim for conversion, a plaintiff must show that: (1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property before its conversion; and (3) defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights. The tort of conversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights. In addition, conversion requires that the owner be harmed as a result of the unauthorized act.

68. However, a conversion occurs only if the officers' actions were unauthorized. If you find that the dog posed an imminent threat to the officers, the officers were authorized to kill the dog. So if you find that the dog posed an imminent threat to the officers, thereby authorizing them to kill the dog, there can be no claim for conversion.

69. **Authority:** Noses v. Martin, 360 F.Supp.2d 533, 541 (S.D.N.Y.2004); News America Marketing In-Store, Inc. v. Marquis, 86 Conn.App. 527, 544 (2004), *cert. granted*, 273 Conn. 905 (2005); Suarez-Negrette v. Trotta, 47 Conn.App. 517, 521 (1998).

THE NEGLIGENCE CLAIM

70. The complaint alleges that O'Hare and Pia were negligent in entering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property. The plaintiff's complaint alleges that the defendants were negligent in that they should have been aware of a substantial and unjustifiable risk that their conduct would violate plaintiff's rights.

GOVERNMENTAL IMMUNITY

71. Under Connecticut common law, both municipalities and municipal employees are provided with immunity from liability for their arguably negligent acts. Therefore, we must first determine if the defendants are entitled to immunity for the acts alleged by the plaintiff.

72. The first issue to resolve is whether the defendants were engaged in governmental acts. Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. I charge you that the defendants were engaged in acts that were performed wholly for the direct benefit of the public and therefore were governmental acts.

73. **Authority:** Gauvin v. New Haven, 187 Conn. 180, 184 (1982); Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 167-68 (1988); Heigl v. Board of Education, 218 Conn. 1, 5 (1991); Violano v. Fernandez, 280 Conn. 310, 318 (2006); Cotto v. Board of Education, 294 Conn. 265, 272 n. 8 (2009); Williams v. City of New Haven, 243 Conn. 763, 766 (1998); Heigl v. Bd. of Ed., 218 Conn. 1, 4 (1991); Ryszkiewicz v. New Britain, 193 Conn. 589, 593 (1994); Williams v. City of New Haven, 243 Conn. 763, 766-67 (1998); Conn. Gen. Stat §52-557n.

74. The next issue to resolve is whether the alleged acts of negligence were discretionary acts. A municipality or municipal employee will not be liable for damages to person or property caused by their negligent acts or omissions which require the exercise of judgment or discretion, but might be liable for negligent acts that are ministerial in nature. Generally, a municipality or municipal employee is liable for the misperformance of ministerial acts, but has immunity in the performance of discretionary or governmental acts.

75. The difference between discretionary or governmental acts and ministerial acts is easily discernable. Municipalities and municipal employees enjoy governmental immunity from liability for the performance of governmental acts as distinguished from ministerial acts. Governmental acts are defined as those, which are supervisory or

discretionary in nature. A ministerial act is one, which is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action. The hallmark of a discretionary act is that it requires the exercise of judgment. In contrast, ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. Discretionary act immunity reflects a value judgment that despite injury to a member of the public the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. In contrast, municipalities and municipal employees are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion.

76. **Authority:** Violano v. Fernandez, 280 Conn. 310, 318 (2006); Heigl v. Bd. of Ed., 218 Conn. 1, 4-5 (1991); Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 167 (1988); Doe v. Petersen, 279 Conn. 607, 614 (2006).

77. Therefore, the question becomes, were the acts of negligence alleged by the plaintiff discretionary acts or ministerial acts? I charge you that the investigation of crimes and the decisions to make arrests are discretionary rather than ministerial functions.

78. **Authority:** Escobales v. New Britain, Superior Court, judicial district of New Britain, Docket No. CV 06 4009470 (May 5, 2006, Shapiro, J.) (41 Conn. L. Rptr. 351), *quoting* Skrobacz v. Sweeney, 49 Conn. Supp. 15, 32 (2003); *see also* Mikita v. Barre, Superior Court, judicial district of New Haven, Docket No. CV 99 0430564 (May

22, 2001, Munro, J.); Peters v. Greenwich, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 95 0147192 (January 2, 2001, D'Andrea, J.) (28 Conn. L. Rptr. 671, 674); Elinsky v. Marlene, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV 96 0557659 (October 31, 1997, Hale, J.T.R.); Gonzalez v. Bridgeport, Superior Court, judicial district of Fairfield, Docket No. CV 88 253464 (June 4, 1993, Fuller J.); Galindez v. Miller, 285 F.Supp.2d 190, 195 (D.Conn.2003).

79. However, discretionary acts can be transformed into ministerial acts if there they are performed in accordance with a set policy or procedure. When a municipal employee acts pursuant to any city charter provision, ordinance, regulation, rule, policy or any other directive, then courts have held that the employee was engaging in a ministerial function. Therefore, when a municipal employee acts pursuant to any city charter provision, ordinance, regulation, rule, policy or any other directive, otherwise discretionary acts will then be transformed into ministerial acts.

80. I charge you that there is no Town of East Hartford charter provision, ordinance, regulation, rule, policy or any other directive that deals with the investigation of crimes and the decision to make arrests. Therefore, since the acts of the investigation of crimes and the decision to make arrests are discretionary acts, and there is no city charter provision, ordinance, regulation, rule, policy or any other directive that deals with these acts, I charge you that the defendants are entitled to governmental immunity for these alleged acts of negligence.

81. **Authority:** Violano v. Fernandez, 280 Conn. 310 (2006); Kolaniak v. Board of Education, 28 Conn.App. 277 (1992).

82. The next issue to address is whether there was an exception to the defendants' governmental immunity defense. There are three exceptions to governmental immunity. Each of these exceptions represents a situation in which the public official's duty to act is so clear and unequivocal that the policy rationale underlying discretionary act immunity-to encourage municipal officers to exercise judgment-has no force. First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. Of the three, only the identifiable person-imminent harm exception is applicable in this case.

83. The identifiable person-imminent harm exception requires the plaintiff to prove three elements: (1) an identifiable victim; (2) an imminent harm and; (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. All three of these factors are intimately tied to the question of foreseeability, and all must be met for a plaintiff to overcome governmental immunity. Failure to establish any one of the three prongs will be fatal to a plaintiff's claim that he comes within this exception.

84. To satisfy the first element of the exception, the plaintiffs must show that they were identifiable victims. They must do so by proving that they were a part of a narrowly defined class of foreseeable victims. The only narrowly defined class of

foreseeable victims are schoolchildren who are statutorily compelled to attend school, during school hours on school days.

85. To satisfy the second element of the exception, the plaintiffs must show that they were subjected to imminent harm. Only after a decision is reached as to whether a plaintiff is either an identifiable person, do we then address whether or not the plaintiff was also subject to imminent harm. Imminent is defined as something about to materialize of a dangerous nature. Imminent harm excludes risks, which might occur, if at all, at some unspecified time in the future. In order to meet the imminent harm element of this exception the risk must be temporary and of short duration. Imminent harm has been defined as harm ready to take place within the immediate future. The alleged imminent harm must be imminent in terms of its impact on a specific identifiable person. Imminent requires a foreseeable event at a discrete place and time period at which the harm will occur.

86. In addition to a limited time period and limited geographic area, an imminent harm must involve a potential for harm that is significant and foreseeable. The logic of this exception is that municipal officers only have a duty to a foreseeable victim to protect against dangers that may be anticipated. On the other hand, where a danger can occur at any time in the future or not at all, there is no imminence. The imminent harm aspect of this exception is very restrictive and applies only to risks that are temporary and confined in space. Imminent harm excludes perils that might occur, if at all, at some unspecified time in the future. We must distinguish between negligent conduct, which creates foreseeable and even continual exposure to harm at some unknown future time and place, and imminent harm.

87. Therefore, the plaintiffs must prove that the alleged harm was limited to this specific location, at this specific time and was foreseeable. If they cannot establish all three – location, duration, foreseeability – then they cannot establish that they were subjected to imminent harm, and accordingly, the identifiable person-imminent harm exception does not apply and the defendants are entitled to governmental immunity. On the other hand, if they do establish all three – location, duration, foreseeability – then they must next establish the third and final element of the exception – apparentness.

88. To satisfy the final element of the exception, the plaintiffs must prove that there was a public official to whom it was apparent that his or her conduct was likely to subject the plaintiffs to the harm. The apparentness requirement is grounded in the policy goal underlying all discretionary act immunity, that is, keeping public officials unafraid to exercise judgment. It surely would ill serve this goal to expose a public official to liability for his or her failure to respond adequately to a harm that was not apparent to him or her.

89. Therefore, the plaintiffs must prove that the alleged harm was apparent to each of the defendants. If they fail to do so, then they cannot establish that the harm was apparent to the defendants, and accordingly, the identifiable person-imminent harm exception does not apply and the defendants are entitled to governmental immunity.

90. If you find that at the time the officers entered the plaintiffs property, they were acting within their discretion, and it was not apparent to them that they would encounter a dog that would charge at them necessitating the killing of the dog and resulting in emotional distress to the minor plaintiff, then the plaintiff cannot establish the

identifiable person-imminent harm exception, and the officers are entitled to governmental immunity.

91. **Authority:** Purzycki v. Fairfield, 244 Conn. 101, 108 (1998); Doe v. Board of Education, 76 Conn.App. 296, 302-03 (2003); Durrant v. Board of Education, 284 Conn. 91, 107 (2007); Colon v. New Haven, 60 Conn. App. 178 (2000); Cady v. Tolland, Superior Court, judicial district of Tolland, 2006 WL 3691736, Docket No. CV 05 5000054 (November 30, 2006, Peck, J.); Tryon v. North Branford, 58 Conn.App. 702, 712 (2000); Bonington v. Town of Westport, 297 Conn. 297 (2010); Purzycki v. Fairfield, 244 Conn. 101, 110 (1998); Burns v. Board of Education, 228 Conn. 640, 650 (1994); Evon v. Andrews, 211 Conn. 508 (1989); Bruno v. BBC Corp., Superior Court, judicial district of Ansonia-Milford at Derby, 2002 WL 1369917, Docket No. CV 00 00716343 (May 22, 2002, Lager, J.); Beaudette v. Amston Lake Tax Dist., Superior Court, judicial district of Tolland, 2008 WL 4853084, 07-5001240 (Oct. 20, 2008); Violano v. Fernandez, 280 Conn. 310, 319-20 (2006); Fleming v. Bridgeport, 284 Conn. 502, 533 (2007); Cotto v. Board of Education, 294 Conn. 265 (2009).

NEGLIGENCE ELEMENTS

92. The plaintiffs have claimed that the defendants' negligence caused their injuries. The complaint alleges that O'Hare and Pia were negligent in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

93. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property. There are, for

purposes of this case, two kinds of negligence: statutory negligence and common-law negligence. Statutory negligence is the failure to conform one's conduct to a duty imposed by the legislature through the enactment of a statute. Common-law negligence is a violation of the duty to use reasonable care under the circumstances. A violation of either of these duties is negligence. Common-law negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would use in the same circumstances.

94. In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendants at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

95. To establish his claim of negligence the plaintiffs must prove four elements: duty; breach of that duty; causation; and actual injury. If a plaintiff cannot prove all of those elements, the cause of action fails.

96. **Authority:** Sharkey v. Skilton, 83 Conn. 503, 508 (1910); Guglielmo v. Klausner Supply Co., 158 Conn. 308, 318 (1969); Hoelter v. Mohawk Services, Inc., 170 Conn. 495, 501 (1976); Angiolillo v. Buckmiller, 102 Conn.App. 697, 711, *cert. denied*, 284 Conn. 927 (2007); Jagger v. Mohawk Mountain Ski Area, Inc., 269 Conn. 672, 687 n. 13 (2004); D'Angelo Development & Construction Corp. v. Cordovano, 121 Conn.App. 165, 184 (2010); Galligan v. Blais, 170 Conn. 73, 77 (1976); Pleasure Beach

Park Co. v. Bridgeport Dredge & Dock Co., 116 Conn. 496, 503 (1933); Geoghegan v. G. Fox & Co., 104 Conn. 129, 134 (1926).

DUTY

97. A duty to use care exists when a reasonable person, knowing what the defendants here either knew or should have known at the time of the challenged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable.

98. In describing the duties involved in this case, I have used the term "reasonable care." Reasonable care is defined as the care which an ordinarily prudent or careful person would use in view of the surrounding circumstances. You must determine the question by placing an ordinarily prudent person in the situation of the defendant and ask yourselves: what would such a person have done? Note that it is the care that such a person would have used under the surrounding circumstances, that is, in view of the facts known or the facts of which the party should have been aware at the time. The standard of care required, that of an ordinarily prudent person under the circumstances, never varies, but the degree or amount of care may vary with those circumstances. For example, in circumstances of slight risk or danger, a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of greater risk or danger, a correspondingly greater amount of care would be required to constitute reasonable care.

99. **Authority:** Coburn v. Lenox Homes, Inc., 186 Conn. 370, 375 (1982); Pisel v. Stamford Hospital, 180 Conn. 314, 332-33 (1980); Orlo v. Connecticut Co., 128 Conn. 231, 237 (1941).

BREACH OF DUTY

100. Next, it is the plaintiffs' burden to prove that the defendants breached the duty of care owed to him.

CAUSATION

101. Next, the plaintiffs must prove that the defendants' breach of duty was the cause of his injuries. In order to prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries, that is, that the conduct both caused the injury in fact and proximately caused the injury. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. The test of proximate cause is whether the defendant's conduct is a substantial factor in producing the plaintiff's injury.

102. If you find that the defendants were negligent in any of the ways alleged in the plaintiffs' complaint, you must next decide if such negligence was a legal cause of any of the plaintiff's claimed injuries. Legal cause has two components: cause in fact and proximate cause. Negligence is a proximate cause of an injury if it was a substantial factor in bringing the injury about. More specifically, negligence is a substantial factor in bringing about an injury if it contributes materially to the production of the injury. Negligence contributes materially to the production of an injury if its causative effects remain in active operation until the moment of injury, or at least until the setting in motion of the final active injurious force which immediately produces or

precedes the injury. By this definition, negligence which makes only a remote, a trivial or an inconsequential contribution to the production of an injury is not a substantial factor in bringing about the injury, and thus is not a proximate cause of the injury.

103. The evidence of causation must be sufficiently clear so that you as jurors could so find without resorting to speculation or conjecture. If you find that the plaintiffs have failed to prove that defendants' conduct was both a cause in fact and a substantial factor in causing their damages, then you must return a verdict in favor of the defendants.

104. **Authority:** Craig v. Driscoll, 262 Conn. 312, 330 (2003). Lodge v. Arett Sales Corp., 246 Conn. 563, 574 (1998); Doe v. Manheimer, 212 Conn. 748, 757-58 (1989); Ferndale Dairy, Inc. v. Geiger, 167 Conn. 533, 538 (1975); Paige v. St. Andrew's Roman Catholic Church Corp., 250 Conn. 14, 25-26 (1999).

SPECIAL DEFENSES TO NEGLIGENCE CLAIMS

105. In this case the defendants have filed special defenses alleging that the plaintiffs injuries were legally caused by his own negligence. The defendants must prove the elements of this special defense by a preponderance of the evidence. Specifically, the defendants must prove that the plaintiffs were negligent in one or more of the ways specified in the special defense and that such negligence was a legal cause of any of the plaintiff's injuries.

CONTRIBUTORY NEGLIGENCE

106. The special defenses filed by the defendants allege a number of specific ways in which the plaintiff was negligent. To prove negligence, it is not necessary for the defendants to prove that the plaintiff was negligent in all of the ways claimed. Proof

that the plaintiff was negligent in just one of the ways claimed is sufficient to prove negligence.

107. The defendants claim that the plaintiffs were negligent in that they: (a) failed to act as a reasonable prudent person; (b) failed to obey the lawful command of police officers; (c) failed to control their dog and keep it from attempting to attack an officer; (d) created the situation where the dog put a police officer at imminent risk of serious physical injury; (e) failed to maintain fencing around their home; and (f) failed to provide adequate warnings of potential harm that might result from entering plaintiffs' property.

108. The defendants have raised a special defense that the plaintiff failed to act as a reasonable and prudent person. That means that the plaintiff was not acting as a reasonably prudent or careful person would have acted in view of the circumstances that you find existed at the time. If you find that the defendants have proved that the plaintiff was not using reasonable care as he ought to have, then the defendants have proved the defense of contributory negligence and you must consider this negligence of the plaintiff in relation to that of the defendants.

109. **Authority:** General Statutes § 52-114; Sitnik v. National Propane Corp., 151 Conn. 62, 65 (1963); Olshefski v. Stenner, 26 Conn. App. 220, 222-25 (1991).

110. I have previously instructed you that the defendants are under the obligation to exercise the care which a reasonably prudent person would use under the circumstances. The plaintiffs are under the same obligation. A plaintiff is negligent if the plaintiff does something which a reasonably prudent person would not have done

under similar circumstances or fails to do that which a reasonably prudent person would have done under similar circumstances.

111. As I have explained, the plaintiff has claimed that the incident was caused by the defendants' negligence, and the defendants have claimed that it was caused by the plaintiffs' own negligence. If you find that negligence on the part of BOTH parties was a substantial factor in causing the incident, then the law is that the plaintiff can recover damages from the defendants only to the extent of the defendants' fault and may not recover damages to the extent that he himself was at fault. If the plaintiffs were more at fault than the defendants, then the plaintiffs cannot recover any damages.

112. Here is an example to make this rule clear: If the plaintiff was 20% at fault and the defendants were 80% at fault, the plaintiff recovers 80% of her damages. If the plaintiff was 50% at fault and the defendants were 50% at fault, the plaintiff recovers 50% of her damages. However, if the plaintiff was more than 50% at fault, he was more at fault than the party he has sued, and he recovers no damages. Just as an example, suppose the plaintiff's total damages were \$100. If the plaintiff was 30% at fault and the defendants were 70% at fault, the plaintiff would recover 70% of the \$100, or \$70. The plaintiff would thus not receive payment for the part of his damages caused by his own negligence.

113. In making this comparison, the number of acts of negligence is not controlling. A party negligent in one respect may be just as negligent as one found negligent in two or more ways. The reverse may also be true. The fact that acts of negligence are of the same kind and character is not conclusive. Two parties may exceed speed laws, for example, in ways that differ widely in manner and degree. In

determining the comparative negligence of each party you should consider the totality of the acts and conduct on each side and the degree to which each contributed to the occurrence and thus arrive at a fair and just determination how the award is to be apportioned.

114. **Authority:** Wright & Daly, Connecticut Jury Instructions, §193.

MITIGATION OF DAMAGES

115. In this case the defendants have filed a special defense alleging that the plaintiffs failed to mitigate their damages. As indicated, the defendants must prove the elements of this special defense by a preponderance of the evidence.

116. The doctrine of mitigation of damages contemplates that one who has been injured by the negligence of another must use reasonable care to promote recovery and prevent any aggravation or increase of the injuries. To claim successfully that the plaintiff failed to mitigate damages, the defendant must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty. An assessment of whether a person has done what a reasonably prudent person would be expected to do under the same circumstances falls under the duty to mitigate damages. The theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to promote recovery and avoid aggravating the original injury.

117. **Authority:** Hallas v. Boehmke & Dobosz, Inc., 239 Conn. 658, 668-69 (1997); Stevenson v. Kettler International, Inc., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 05 5000357 (August 14, 2006, Lewis, J.T.R.) (42 Conn. L. Rptr. 69).

USE OF PHYSICAL FORCE IN DEFENSE OF PERSON

118. A person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose. Deadly physical force may be used if the person reasonably believes that such other person is using or about to use deadly physical force, or inflicting or about to inflict great bodily harm. A person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety by retreating. However, a police officer is not required to retreat.

119. **Authority:** C.G.S. §53a-19

THE RECKLESSNESS CLAIM

120. The plaintiffs have also alleged that the officers were reckless. The complaint alleges that O'Hare and Pia were reckless in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

121. Recklessness is a state of consciousness with reference to the consequences of one's acts. It is more than negligence, more than gross negligence.

The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Wanton misconduct is reckless misconduct. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. Willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.

122. **Authority:** Craig v. Driscoll, 262 Conn. 312, 342 (2003).

USE OF PHYSICAL FORCE IN DEFENSE OF PERSON

123. A person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose. Deadly physical force may be used if the person reasonably believes that such other person is using or about to use deadly physical force, or inflicting or about to inflict great bodily harm. A person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety by retreating. However, a police officer is not required to retreat.

124. **Authority:** C.G.S. §53a-19

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on January 7, 2011, a copy of the foregoing Proposed Jury Instructions was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

EXHIBIT F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Minor Plaintiff

Because K.H. is under 18, she is a minor under the law. A minor may only bring a federal lawsuit through a representative such as her parent or guardian. So although K.H. is a complainant in this action, along with her father, Glen Harris, I will refer throughout these instructions only to "the plaintiffs" as Glen Harris, since he is acting on his own behalf as well as on behalf of his daughter.

Authority: F.R. Civ. Pro. 17

Conspiracy

The plaintiffs claim that the defendants participated in a conspiracy to engage in the illegal entry into the plaintiffs' yard, in violation of plaintiffs' constitutional rights. A civil rights conspiracy is an agreement – express or implied – between two or more persons to deprive the plaintiffs of their constitutional rights. To sustain a conspiracy, you must find the following by a preponderance of the evidence: (1) The existence of an express or implied agreement among the defendant officers to deprive plaintiffs of their constitutional rights; and (2) an actual deprivation of those rights resulting from the agreement. To be liable as a conspirator, a defendant must be a voluntary participant in the common venture, although he or she need not have agreed on the details of the plan or even know who the other conspirators are. It is enough if the person understands the general objectives of the plan, accepts them, and agrees, either explicitly or implicitly, to do his or her part to further them.

Because direct evidence of the conspiracy is usually impossible to obtain, circumstantial evidence is the usual manner of proving a civil conspiracy.

If you find from consideration of the evidence, that there was an agreement between the defendants to search the plaintiffs' property in violation of their civil rights, and that a defendant agreed to do his part, either explicitly or implicitly, to facilitate the search, then you should find the defendant liable for conspiracy. Each conspirator is responsible for everything done by co-conspirators that follows from the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original plan. A

defendant, therefore, who is proved to be a member of a civil conspiracy is liable for a plaintiff's injuries caused by the conspiracy, even if his own personal acts did not proximately contribute to that injury.

Authority: *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988)

Duty of Officers to Prevent Violations by Another Officer

Police officers have an affirmative duty to enforce the law and preserve the peace. This includes stopping other police officers from violating the law. A police officer may not ignore the duty imposed by his office and fail to stop another officer who is acting illegally in his presence. Thus if you find that Officer O'Hare unlawfully entered the plaintiffs' property and unlawfully shot the plaintiffs' dog, and that Officer Pia was in a position to and had the ability to stop the unconstitutional conduct of O'Hare, but did nothing to prevent it, you may hold Pia liable for the unlawful conduct of O'Hare.

Authority: *U.S. v. Koon*, 34 F.3d 1416 (9th Cir. 1994), aff'd in part, re'vd in part on other grounds, *Koon v. U.S.*, 518 U.S. 81 (1996); *Anderson v. Branen*, 17 F.3d 552 (2d Cir. 1994)

Joint and Several Liability

The plaintiffs also claim that the defendant officers acted jointly with and/or assisted each other. Where two persons act together and cause a wrong to another person, they are held under the law to be liable jointly for the acts of each other. The law does not require the plaintiffs to establish how much of the injury was done by one defendant, and how much of the injury was caused by the other. Rather, it permits the injured party to treat all concerned in the injury jointly and all are liable to the plaintiffs in a total sum as damages. If both defendants actively participated in a wrongful act, by cooperation or request, or if they lent aid or encouragement to the other, or ratified or adopted the acts for their benefit, they are equally liable. A specific agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it be a implied one.

Authority: *Prosser and Keeton on Torts* (5th Ed.), pp. 322-24 § 46; *Gagnon v. Ball*, 696 F.2d 17 (2d Cir. 1982).

Section 1983 Claims

The plaintiffs have the burden of proving each and every element of their claim under Title 42, United States Code, Section 1983 by a preponderance of the evidence. If you find that each of the following elements of the claim under Title 42 United States Code Section 1983 has been proven by a preponderance of the evidence, then you will return a verdict in the plaintiffs' favor. I will explain the elements of a section 1983 claim below.

Authority: Gomez v. Toledo, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); 5-87 Modern Federal Jury Instructions-Civil _ 87.03

1. Elements of a Section 1983 Claim

To establish a claim under section 1983, a plaintiff must establish, by a preponderance of the evidence, each of the following three elements:

- First, that the conduct complained of was committed by a person acting under color of state law;
- Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and
- Third, that the acts of one or more defendants were the proximate cause of the injuries and consequent damages sustained by a particular plaintiff.

I shall now describe each of the three elements in greater detail.

Authority: Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); Gomez v. Toledo, 446 U.S. 635, 638, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); Eagleston v. Guido, 41 F.3d 865 (2nd Cir. 1994); and 5-87 Modern Federal Jury Instructions-Civil _ 87.03

\

a. Action Under Color of State Law

The first element of the plaintiffs' claims is that the defendants acted under color of state law. Section 1983 forbids action taken under color of state law where the actor misuses power that he possesses by virtue of state law. The phrase "under color of state law" is a shorthand reference to the words of section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state. The term "state" encompasses any political subdivision of a state, such as the City of Hartford, and its police department. It is

undisputed that the defendants here were employed as Hartford Police officers at the time of the acts complained of. Therefore you must find that this element has been established.

Authority: American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ; Adickes v. S.H. Kress Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) ; Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) ; Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) ; United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1361 (1941) ; Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, 4 L.R.R.M. (BNA) 501 (1939) ; Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913) ; Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1880); and 5-87 Modern Federal Jury Instructions-Civil _ 87.03

Note: State Official Acting under Color of State Law as a Matter of Law

Whether the defendant committed the acts alleged by the plaintiff is a question of fact for you, the jury, to decide. I will instruct you in a moment on how you will decide that issue. For now, assuming that the defendant did commit those acts, I instruct you that, since both defendants were acting as municipal Hartford police officers at the time of the acts in question, they were acting under color of state law. In other words, this statutory requirement is established.

Authority: Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); and 5-87 Modern Federal Jury Instructions-Civil _ 87.03

b. Deprivation of Right

The second element of plaintiffs' claim is that they were deprived of a federal right by one or both of the defendants. In order for the plaintiff to establish the second element, he must show three things by a preponderance of the evidence:

- First, that the defendant committed the acts alleged by a plaintiff;
- Second, that those acts caused the plaintiff to suffer the loss of a federal right;
- and,
- Third, that, in performing the acts alleged, the defendant acted intentionally, recklessly or maliciously.

A defendant acts intentionally if he acts with knowledge, and recklessly if he acts with disregard to known probable consequences. A person's intent is generally proved through circumstantial evidence.

Authority: Conn v. Gabbert, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) ; Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) ; Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980) ; Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) ; Monell v. Department of Social Servs, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); Young v. County of Fulton, 160 F.3d 899 (2d Cir. 1998) ; Marshall v. Switzer, 10 F.3d 925 (2nd Cir. 1993); and 5-87 Modern Federal Jury Instructions-Civil _ 87.03.

c. Proximate Cause

The third element which plaintiff must prove is that the defendant's acts were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of the defendant. If you find that the defendant has proved, by a preponderance of the evidence, that the plaintiff complains about an injury which would have occurred even in the absence of the defendant's conduct, you must find that the defendant did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

A defendant is not liable if plaintiff's injury was caused by a new or independent source of an injury which intervenes between the defendant's act or omission and the plaintiff's injury and which produces a result which was not reasonably foreseeable by the defendant.

Authority: Grivhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979) ; Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S.

274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Gierlinger v. Gleason*, 160 F.3d 858 (2d Cir. 1998); and 5-87 Modern Federal Jury Instructions-Civil _ 87.03

2. Fourth Amendment Right Against Unreasonable Searches or Seizures of Residence.

a. Illegal Entry by Defendants

The Fourth Amendment of the United States Constitution states “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” In this case, the parties have stipulated that the officers in question did not have a warrant at the time of the entry, and they did not have the permission of the plaintiffs or any other resident to enter. Any warrantless entry into a home, no matter how minor, is considered unreasonable and therefore unlawful unless there is consent or exigent circumstances. In this case, the parties have also stipulated that the Officers never obtained consent to enter the subject residence.

Exigent circumstances involve emergency situations where officers act to prevent danger to human life, destruction of evidence, and/or flight of a suspect. I instruct you, however, that no exigent circumstances existed here to justify the entry of the officers onto the plaintiffs’ property.

Authority: United States Constitution, Amendment IV; *Payton v. New York*, 445 U.S. 573, 586 (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990).

b. Privacy Rights in the Curtilage of the Home

The Fourth Amendment protects the privacy interest people have in their dwelling by requiring police to obtain a warrant before entering and searching. This heightened privacy interest afforded to a dwelling extends equally to what is called “the curtilage” of the home.

This is the part of the yard to which extends the intimate activity associated with the sanctity of the home and the privacies of life. Thus, an illegal entry into a home's curtilage is equivalent to an illegal entry into the house itself. There are four factors that bear upon the question of whether an area is curtilage, but they are not exclusive nor is their existence required:

(1) the proximity or nearness of the area to the home; (2) whether the area is included all or partially within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by on the street or sidewalk.

These are merely guidelines meant to shed light on the ultimate question whether an individual has a reasonable expectation of privacy in an area, and should not be applied mechanically. If the area is not curtilage, then it is considered an "open field." In deciding what constitutes a reasonable expectation of privacy, you should consider the actual use of the property, not the knowledge that the officers had or should have had about the use at the time of their entry.

The closer the area is to the home, the more reasonable it is to infer that the area in question is curtilage. Normally, a fenced-in yard constitutes curtilage of a home, if it immediately adjoins the home. It is not necessary for a fence to completely encircle or enclose an area in order to constitute curtilage. Nor is it necessary for the plaintiffs to demonstrate that the fence block a passerby's view over or around a fence. The question for your determination is whether the defendants were in a location where a member of the public had the right to be, just as if they were standing in an open field. If they were not, then you may find that the defendants violated the fourth amendment.

Authority: *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170, 180 (1984); *Payton v. New York*, 445 U.S. 573, 585 (1980); *United States v. Hayes*, 551 F.3d 138 (2d. Cir. 2008); *United States v. Reilly*, 76 F.3d 1271 (2d Cir. 1996); *Brocuglio v. Proulx*, 478 F. Supp. 2d 297 (D. Conn. 2007), *aff'd*, 2009 WL 1059896 (2nd Cir. Apr 21, 2009); *Hart v. Myers*, 183 F. Supp. 2d 512 (D. Conn. 2002.)

c. Illegal Seizure of Plaintiffs' Dog

The plaintiffs also claim that the defendants violated the fourth amendment when they shot and killed their pet St. Bernard. This shooting constitutes a "seizure" under the Fourth Amendment, which provides for the right of the people to be secure in their effects, including animals, against unreasonable searches and seizures. Dogs are recognized to be "effects" under

the Fourth Amendment, and their destruction by police officers constitutes a “seizure.” The question, therefore, for you to determine, is whether the defendants’ actions were reasonable. If you determine that the defendants were unlawfully on the plaintiffs’ property, and that the trespass placed defendant O’Hare in the position where his shooting of the the St. Bernard was a proximate cause of his unlawful entry, then its destruction was not reasonable, and you must find for the plaintiffs.

Even if you find that the defendants were lawfully on the plaintiffs’ property, this still would not justify the killing of the plaintiffs’ family pet, unless defendant O’Hare’s actions were necessary to protect himself from imminent harm. Private citizens have a clear interest in ensuring that their personal belongings and effects, including pets, are safe within the confines of their property. Thus, a police officer may not destroy a pet when it poses no immediate danger.

Authority: *Dziekan v. Gaynor*, 376 F. Supp.2d 267, 270 (D. Conn. 2005); *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir.2005); *Altman v. City of High Point*, 330 F.3d 194, 205 (4th Cir. 2003); *Warboys v. Proulx*, 303 F.Supp.2d 111, 117 (D.Conn. 2004); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3d. Cir. 2001); *Hatch v. Grosinger*, 2003 WL 1610778 (D. Minn., March 3, 2003)

3. Substantive Due Process

The plaintiffs also claim that defendant O’Hare’s shooting and killing of their pet St. Bernard constituted a violation of the fourteenth amendment’s substantive due process clause, which protects against government power arbitrarily and oppressively exercised. To prevail on a claim of violation of substantive due process, a plaintiff must prove that the defendant’s conduct shocks the conscience. An act by a police officer which is intended only to oppress or to cause injury and serves no legitimate government purpose may very well shock the conscience. Such acts by their very nature offend fundamental democratic notions of fair play, ordered liberty and human decency.

Therefore, if you find that the plaintiffs have proven, by a preponderance of the evidence, that defendant O’Hare’s actions (1) served no legitimate government purpose and (2) offended standards of fair play and human decency so as to shock the conscience, then you will find for the plaintiffs on their substantive due process claim.

Authority: *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Gargiul v. Tompkins*, 704 F.2d 661 (2d Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1016

(1984); *Reed v. Town of Branford*, 949 F. Supp. 87, 90-91 (D.Conn. 1996) (citing *Interport Pilots Agency v. Sammis*, 14 F.3d 133, 144 (2d Cir. 1994); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2nd Cir. 2001)

B. State Tort Claims

1. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress has four elements: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the emotional distress was severe. Like all other claims here, this one must be proved by a preponderance of the evidence. Damages are not limited to easily determined special damages such as medical bills, hospitalization and attorney's fees; damages are also designed to compensate for intangible injuries such as mental anguish, humiliation, embarrassment, mortification, shame and terror.

When reviewing this claim, you should specifically consider the plaintiff's allegation that the defendant police officers illegally in the plaintiffs' yard, with guns drawn, at the time of the incident, as well as the evidence of the minor plaintiff that the third and fatal shot was fired at her pet in her presence after it was lying on the ground.

If you find that the plaintiffs have proved these facts by the preponderance of the evidence, then you must find in their favor on this claim.

Authority: *Carol v. Allstate Ins. Co.*, 262 Conn. 433 (2003); *DeLaurentis v. New Haven*, 220 Conn. 225 (1991); *Petyan v. Ellis*, 200 Conn. 243 (1986); *Urban v. Hartford Gas Co.*, 139 Conn. 301 (1952); *Wocheck v. Foley*, 193 Conn. 582 (1984); *Gibney v. Lewis*, 68 Conn. 392 (1896).

2. Trespass

I have previously instructed you with respect to the plaintiffs' claim that defendants violated their fourth amendment rights when they entered the curtilage of the yard. If you find in

favor of the plaintiff with respect to that claim, then you would necessarily find in favor of the plaintiffs with regard to their state law claim of trespass. However, you do not need to find the existence of curtilage in order to find against the defendants for a state law trespass. The law of trespass has four elements: (1) ownership or possessory interest in the land by the plaintiff; (2) invasion, intrusion, or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury.

If you find that the plaintiffs have proved these four elements by a preponderance of the evidence, then you must find for the plaintiffs, and consider any resultant damages that were a proximate cause of the defendants' unlawful acts.

Authority: *Boyne v. Town of Glastonbury*, 110 Conn.App. 591 (2008); *City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 87 (2007)

3. Conversion

The plaintiffs claim that the defendants committed the civil tort of conversion when they killed their St. Bernard. A conversion, under Connecticut law, occurs occurs when a defendant commits an unauthorized act which deprives a plaintiff of his property permanently or for an indefinite time. I have already explained that a pet dog constitutes property under our laws. In order to prove their claim of conversion, the plaintiffs must prove, by a preponderance of the evidence, the following three elements: (1) that they were the real owners of the St. Bernard; (2) that the plaintiffs were deprived of the dog permanently by its killing; and (3) that the acts of one or more of the defendants that deprived the plaintiffs of their property were unauthorized. In this case the defendants do not dispute the fact that the plaintiffs owned Seven, the St. Bernard. They also do not dispute the fact that the shooting of the dog permanently deprived the plaintiffs of their property. You must determine, by a preponderance of the evidence, that neither of the defendants was authorized or justified in shooting the dog.

Authority: *Sullivan v. Thorndike*, 104 Conn. App. 297, 307 (2007); *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770-71, (2006).

4. Connecticut Constitution Article I, § VII.

Article first, § 7 of the Connecticut Constitution affords greater protection to its citizens than does the fourth amendment. The federal constitution establishes a minimum national standard for the exercise of individual rights; however, that does not inhibit the state of Connecticut from affording higher levels of protection to its citizens under the state constitution.

Connecticut offers heightened protection to the individual. A police officer's legal obligation extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to protect and defend those rights. Consequently, when a law enforcement officer, acting with the apparent approval of state law, not only fails to protect a citizen's rights but affirmatively violates those rights, it is manifest that such an abuse of authority, with its related breach of trust, may lead to a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the wrongful conduct of a private citizen.

Under the Connecticut state constitution, all warrantless searches and seizures, whether or not the police have probable cause to believe that a crime was committed, are unreasonable unless they fall within one of the few delineated exceptions to the warrant requirement, such as consent or exigent circumstances. In determining whether exigent circumstances justified the officers' entry and subsequent acts pursuant to the Connecticut Constitution, you should consider whether, under the totality of the circumstances, the defendants had reasonable grounds to believe that someone was about to destroy evidence immediately during the time necessary to procure a warrant. If you determine that no exigency justified the officers' entry, then you must find in favor of the plaintiffs on their state constitutional claim. Furthermore, if you have already found in favor of the plaintiffs with respect to either their federal Constitutional claims or their state law claim of trespass as they relate to the warrantless entry or entries into plaintiffs' yard, then you would necessarily find in favor of the plaintiffs on this claim as well.

Authority: Connecticut Constitution Article First, § 7; *State v. Geisler*, 222 Conn. 672 (1992); *State v. Oquendo*, 223 Conn. 635 (1992); *State v. Guertin*, 190 Conn. 440 (1983); *State v. Blades*, 225 Conn. 609 (1993); *Binette v. Sabo*, 244 Conn. 23 (1998)

Negligence

The plaintiffs also claim that the defendants were negligent in their actions, and that such negligence resulted in damages to the plaintiffs. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property, and which causes harm. In other words, negligence is the failure to do what a reasonable prudent man would do under the circumstances. It is the breach of a legal duty owed by one person to another, and that legal duty is the exercise of reasonable care. Negligence is a

proximate cause of an injury if it was a substantial factor in bringing the injury about.

If you find, by a preponderance of the evidence, that one or both of the defendants was negligent, then you will find in favor of the plaintiffs.

Authority: *Sharkey v. Skilton*, 83 Conn. 503 (1910); *Winn v. Posades*, 281 Conn. 50 (2007); *Pilon v. Alderman*, 112 Conn. 300, 301-302 (1930); *Phelps v. Lankes*, 74 Conn. App. 597, 606-607 (2003); Civil Jury Instructions on Judicial Website 2.1-2; Wright & Ankerman, *Connecticut Jury Instructions (Civil)*, 4 ed., § 520 (1993).

Reasonable Care

In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendants at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

A person is required to use greater care in the presence of children. The question is whether a reasonably prudent person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the same general nature as that which occurred here was likely to result. Therefore, if you find that the defendants should have anticipated that their entry into the yard could alert the plaintiffs' dog to the presence of trespassers, and that such animal might chase after intruders who turn and run away, then you must find that the defendants owed the plaintiff a duty of care to prevent any resultant injuries and damages.

Authority: Adapted from Civil Jury Instructions on Judicial Website 3.6-4, 3.6-6; *Galligan v. Blais*, 170 Conn. 73, 77 (1976); *Pleasure Beach Park Co. v. Bridgeport Dredge & Dock Co.*, 116 Conn. 496, 503 (1933); *Geoghegan v. G. Fox & Co.*, 104 Conn. 129, 134 (1926); *Purzycki v. Fairfield*, 244 Conn. 101 (1998).

Cause

If you find that the defendants owed the plaintiffs a duty of care and failed to meet that duty, you must decide whether the breach of that duty caused the plaintiff's

injury. Legal cause has two components: cause in fact and proximate cause.

A cause in fact is an actual cause. The test for cause in fact is, simply, "Would the injury have occurred were it not for a defendant's negligence?" If your answer to this question is "no," then the defendant's negligence was a cause in fact of the plaintiff's injuries.

Negligence is a proximate cause of an injury if it was a substantial factor in bringing the injury about, in other words, if it materially caused the injury. Negligence which makes only a remote, a trivial or an inconsequential contribution to the production of an injury is not a substantial factor in bringing about the injury, and thus is not a proximate cause of the injury.

Authority: Adapted from Civil Jury Instructions on Judicial Website 3.1-1, 3.1-2, 3.1-3, 3.1-4.

Indemnification

Under our law, municipalities are liable to indemnify or pay damages for the acts of their employees, if notice of a claim has been filed with the municipality within six months of an incident. The parties have stipulated that such notice was received. Therefore if you were to find either defendant O'Hare or Pia liable on any of the plaintiffs' claims, then you will also find against the City of Hartford so that the city will be responsible for all payments on behalf of the defendants.

Authority: Conn. Gen. Stat. §§ 7-101a, 7-465

Damages

If, after deliberating, you decide that the plaintiffs have proven each element of one or more of the claims against a particular defendant, then you should turn to the issue of damages as to each claim you have found proven. It is your function to decide the issue of liability. I am instructing you on elements of damages only so that you will have guidance should you decide that the plaintiffs are entitled to recover damages on one or more claim.

You should give damages only for those injuries caused by the conduct you find satisfies

the elements of a cause of action, in accordance with these instructions. You should consider separately the issue of damages with respect to each party and each claim in the event that you find for the plaintiffs on more than one of their claims.

There are different types of damages, some or all of which may arise in the context of different causes of action. Let me now explain each type to you.

1. Actual Damages

The first type of damages is called actual damages, the purpose of which is to award, as far as possible, fair and just compensation. When calculating damages for any of the plaintiffs' claims, you may award actual damages. If you decide for the plaintiffs on an issue of liability, you must then fix the amount of damages that will reasonably and fairly compensate him or her for any harm that the wrongful conduct of a defendant was a substantial factor in bringing about; that is, to make the plaintiff whole. These damages are known as actual damages. These damages may include economic and non-economic damages. Non-economic damages include pain and suffering, emotional distress, and mental anguish.

In order to award damages for a given injury or harm, you must find that a plaintiff has proven by a preponderance of the evidence that a defendant caused the claimed injury or harm. Actual damages must not be based on speculation or sympathy. Nor may damages be based on the abstract "value" or "importance" of a constitutional or legal right. Damages must be based on the evidence at trial. On the other hand, the law does not require the plaintiff to prove the amount of his or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

The burden is on the plaintiffs to prove that any claimed element of damages was a proximate consequence of a proven wrongful act, as well as to prove the reasonable amount with

respect to any such element of his or her damages. Thus, the plaintiffs may recover fair, reasonable, and just compensation for only those elements they have proven were caused by the acts of a defendant.

No evidence of the value of such intangible things as mental or emotional distress has been or need be introduced. In that respect, it is not value you are trying to determine, but rather an amount that will fairly compensate the plaintiff for the damages he or she has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. This is a matter that is left to the conscience, good sense, and sound judgment of the jury. You should not act unreasonably through bias, passion, or sympathy, but rather should exercise common sense and fix an amount of damages, that, in accordance with the evidence and the law, will fairly compensate a plaintiff for all injuries suffered.

Authority: *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) ; *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) ; *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) ; *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999) ; *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir. 1994) and 5-87 Modern Federal Jury Instructions-Civil _ 87.03.

2. Punitive Damages

The second type of damages is called punitive damages. Punitive damages may be awarded to the plaintiffs under their Section 1983 claims. Punitive damages may also be awarded, in the form of attorneys' fees pursuant to the plaintiff's state law claims of intentional infliction of emotional distress claim and/or trespass. If you find that a plaintiff has proven a Section 1983 claim, an intentional infliction of emotional distress claim, a trespass or conversion claim, in other words, any claim except negligence, then you must decide whether the plaintiff is entitled to an award of punitive damages.

The law permits the jury, under certain circumstances, to award the injured person

punitive damages, in order to punish the wrongdoer for some extraordinary conduct, and to serve as a warning to others not to engage in such conduct. Punitive damages, when appropriate, are intended to protect the community and to be an expression of the jury's indignation at the misconduct.

In considering whether to award punitive damages against a defendant on the plaintiff's claims, you should determine whether you find that a defendant engaged in either:

- (1) willful, wanton, or malicious violation of the plaintiffs' rights, or
- (2) reckless disregard of whether or not his actions were in violation of the plaintiffs' rights.

By malicious or willful, I mean that the defendant's actions were inspired by a purpose to do a plaintiff harm, and that a defendant had an intent to bring about such a result. In determining whether the defendant's conduct was malicious or willful, you must consider what he did in light of all the circumstances, for malice and wilfulness may only be found as an inference reasonably drawn from all the facts. I said to you also that a plaintiff is entitled to punitive damages where a defendant's acts are wanton, and by that I mean a reckless disregard of the consequences which might follow from such acts. Whether you decide to award punitive damages is entirely within your discretion.

The amount of punitive damages that you may award for the plaintiff's Section 1983 claims is solely within your discretion. If the plaintiff has proven to you a Section 1983 claim against a defendant and that the actions of a defendant were malicious, wilful, or wanton as to the plaintiffs, as I have explained those words to you, you should determine what amount, if any, in addition to actual or nominal damages, the plaintiffs are entitled to recover from that defendant as punitive damages for each claim.

Even though you have exclusive control over the amount of section 1983 punitive

damages, in awarding damages, you must not be influenced by any sympathy, bias, or prejudice with regard to any party to the case.

Unlike a Section 1983 claim, however, the amount of punitive damages under the plaintiffs' state law claims are limited to attorney's fees and certain costs that will be determined by the court. You need only determine if a plaintiff has proven that he or she is entitled to them, and the court will then calculate the amount.

Authority: *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) ; *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) ; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) ; *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) ; *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) ; *Mathie v. Fries*, 121 F.3d 808 (2d Cir. 1997) ; *Vasbinder v. Ambach*, 926 F.2d 1333 (2d Cir. 1991) ; 5-87 Modern Federal Jury Instructions-Civil _ 87.03

Credibility of Police Officers

The testimony of a police officer is entitled to no special or exclusive sanctity. A police officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case of police officers you should not believe them merely because they are police officers. You should recall his or her demeanor on the stand, the manner of testifying, the substance of that officer's testimony, any interest he or she may have in the outcome of the case, including those officers who are parties to the case, and weigh and balance the testimony just as carefully as you would the testimony of any other witness. Police officers do not stand in any higher station in the community than any other person, and their testimony is not entitled to any greater weight.

Authority: *Roberts v. Hollocher*, 664 F.2d 200 (8th Cir. 1981); *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir. 1981).

Credibility of Witnesses In General

You must use your own judgment and intuition to determine where the truth lies. You watched the witnesses testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did he or she appear to be frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was his or her demeanor-that is, carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how it is said that moves us.

You should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he testified, the accuracy of his memory, his candor or lack of candor, his intelligence, the reasonableness and probability of his testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony. In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

If you find that any witness has testified falsely with respect to a material fact in the case, you may, but you are not required to, disregard his entire testimony. Or, in your discretion, you may choose to follow that which you believe is true, and reject the balance. It is entirely within your discretion to weigh it, to determine the weight to be given to the testimony and to judge the credibility of the witness.

Authority: Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944); Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) 4-76; and Modern Federal Jury Instructions-Civil ¶ 76.01

Additional Requests

The plaintiff respectfully requests leave to supplement his request for jury instructions after the evidence and prior to the charging conference. This request is made in abundance of caution and on the theory that the defendant can not reasonably anticipate how the evidence will be presented and what instructions, in addition to the foregoing and accompanying legal issues will be necessary to enable the jury to reach their verdict.

THE PLAINTIFFS
GLEN HARRIS, individually and P.P.A.

By /s/
Jon L. Schoenhorn & Associates, LLC.
108 Oak Street
Hartford, CT 06106
(860) 278-3500
Fax: (860) 278-6393
Civlrights@aol.com

EXHIBIT G

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JANUARY 7, 2011

DEFENDANTS' MOTION IN LIMINE

I. CASE BACKGROUND

On December 20, 2006, two officers of the Hartford police arrested a Mr. Hemmingway at 717 Garden Street with several bags of heroin on his person. Mr. Hemmingway informed the officers that in the rear of 297 Enfield Street there was an abandoned gray vehicle that contained two guns. Hemmingway would not say how he knew about the guns, but stated that they were located in the vehicle.

Hartford Police Officers O'Hare and Pia reported to the residence. When they arrived they entered the front yard through an open gate in a chain link fence. They then walked along the side of the three family house that was located on the property, and when they reached the rear corner of the house, peeked around the corner.

Before entering the back yard they saw the dog, turned around and ran. This area of the yard they entered was not enclosed, and the plaintiffs took no steps whatsoever to protect said area from entry or from view.

There was no fence that enclosed the property, and in fact, the front gate to the chain link fence was left open. Along the edge of the front yard of the property was an approximate 4 foot high chain link fence with multiple openings. The chain link fence

had a large opening where the driveway was located. There was also a gate in the chain link fence leading to the front door, which was left open. Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard. Furthermore, there was a portion of fencing on the side of the property that was knocked down. Finally, there was no fence or barrier separating the front yard from the backyard.

Further, neither the front nor back yard was enclosed by fencing or some other barrier, there was a large opening in the front fence where the driveway was located, and the front gate was left open. There was also no fencing or other barrier separating the front yard from the back yard. Further, there was no stockade or similar type fence in the front yard blocking ones view, but merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no "No trespassing" signs or anything to that effect to keep people out of the property.

The officers observed the large dog, the dog looked in their direction and began to growl and charge at them. As the officers were running, the large dog was growling, snapping and lunging at O'Hare. The dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner.

When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog. The dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. The dog continued to gain on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog.

Therefore, after making every effort to outrun the dog and get the dog to stop by yelling get back, O'Hare was left with no other choice than to shoot the dog as he believed that it was about to attack him. Officer O'Hare discharged three rapid succession shots into the dog stopping it instantly.

The plaintiffs assert that the entry and subsequent killing of their dog was an illegal search and seizure under the Fourth Amendment; that killing the dog in front of the minor plaintiff violated the Fourteenth Amendment's guarantee of substantive due process; that the defendants' actions violated the Connecticut State Constitution, Article I, Section 7; that killing the dog in front of the minor plaintiff constituted the intentional infliction of emotional distress; the defendants' entry onto the property constituted a trespass; that killing the dog constituted conversion; that the defendants were negligent in entering the property without a warrant or valid exception to the warrant requirement; and that the City of Hartford should indemnify the individual defendants and pay all damages on their behalf to the plaintiffs.

II. PROPOSED EXHIBITS AND OBJECTIONS

The plaintiffs also seek to introduce various Exhibits to which the defendants object. First, the plaintiff seeks to introduce Exhibit #13, WFSB-TV news footage of scene. The defendants object to this Exhibit as it is irrelevant. Also, it is very prejudicial to the defendants, yet has little probative value. The plaintiffs also seek to introduce Exhibit # 20 Bullet fragments recovered from dog during necropsy. The defendants object to this Exhibit as it is irrelevant. Next, the plaintiffs seek to introduce Exhibit # 21 Release of Items Form prepared by UConn Department of Veterinary Science. The defendants object to this Exhibit as it is irrelevant. Finally, the plaintiffs seek to

introduce Exhibit # 22 CV of Dr. Nancy Eiswirth. The defendants object to this Exhibit as it is hearsay.

III. LAW AND ARGUMENT

A. LEGAL STANDARD

The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility of certain forecasted evidence. See, Luce v. United States, 469 U.S. 38, 40 n. 2 (1984) (explaining that the motion in limine is used to “to exclude anticipated prejudicial evidence before the evidence is actually offered”); *see also* Palmieri v. Defaria et al., 88 F.3d 136, 141 (2d Cir.1996) (“The purpose of an in limine motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.”); Nat'l. Union Fire Ins. Co. v. L.E. Myers Co. Group et al., 937 F.Supp. 276, 283 (S.D.N.Y.1996). Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. See, Baxter Diagnostics, Inc. v. Novatek Med., Inc., No. 94-cv-5220, 1998 WL 665138, at *3 (S.D.N.Y. Sept.25, 1998); Nat'l Union Fire Ins. Co., 937 F.Supp. at 287. Courts considering a motion in limine may reserve judgment until trial so that the motion is placed in the appropriate factual context. See, Nat'l. Union Fire Ins. Co., 937 F.Supp. at 287. Alternatively, a district judge is “free, in the exercise of sound judicial discretion, to alter a previous in limine ruling” at trial as “the case unfolds, particularly if the actual testimony differs from what was contained in the [movant's] proffer.” Luce, 469 U.S. at 41-42.

B. PLAINTIFFS' EXHIBIT #13, WFSB-TV NEWS FOOTAGE OF SCENE

The plaintiffs seek to introduce Exhibit #13, WFSB-TV news footage of scene. The defendants object to this Exhibit as it is irrelevant. The footage is merely raw news footage with no sound and no reporting information.

Rule 402 of the Federal Rules of Evidence states that "[a]ll relevant evidence is admissible." Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Fed.R.Evid. 402.

The footage has no relevance to any of the issues presented in this case. It was taken after the subject incident and only shows the front yard for a few brief moments. Also, there are various photographs that show the plaintiffs' property, so the plaintiffs do not need the news video, which doesn't really show anything except the front of the house for only a few brief moments.

Also, the probative value of the footage is greatly outweighed by its prejudicial affect. Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The footage suggests something was done improperly by the police department and that is why WFSB sent out a news crew. This is highly prejudicial. However, there

are various photographs that show the property, so the plaintiffs do not need the news video, which doesn't really show anything except the front of the house. Therefore, there is hardly any probative value to the case, yet it is highly prejudicial to the defendants. Accordingly, Exhibit #13 should be precluded.

C. PLAINTIFFS' EXHIBIT #20, BULLET FRAGMENTS RECOVERED FROM DOG DURING NECROPSY

The plaintiffs seek to introduce Exhibit # 20 Bullet fragments recovered from dog during necropsy. The defendants object to this Exhibit as it is irrelevant.

Rule 402 of the Federal Rules of Evidence states that “[a]ll relevant evidence is admissible.” Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence.” “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.” Fed.R.Evid. 402.

The actual bullet fragments have no relevance to any of the issues presented in the case. They have no relevance to whether the area of the plaintiffs yard the officers entered was curtilage. They also have no relevance to whether the dog posed an imminent threat to the officers. Finally, they are in no way relevant to any of the plaintiff's state law claims. Therefore, Exhibit #20 should be precluded.

D. PLAINTIFFS' EXHIBIT #21, RELEASE OF ITEMS FORM PREPARED BY UCONN DEPARTMENT OF VETERINARY SCIENCE

The plaintiffs seek to introduce Exhibit # 21 Release of Items Form prepared by UConn Department of Veterinary Science. The defendants object to this Exhibit as it is irrelevant.

Rule 402 of the Federal Rules of Evidence states that “[a]ll relevant evidence is admissible.” Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence.” “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.” Fed.R.Evid. 402.

The Release of Items Form prepared by UConn Department of Veterinary Science has no relevance to any of the issues presented in the case. It has no relevance to whether the area of the plaintiffs yard the officers entered was curtilage. It also has no relevance to whether the dog posed an imminent threat to the officers. Finally, it is in no way relevant to any of the plaintiff's state law claims. Therefore, Exhibit #21 should be precluded.

E. PLAINTIFFS' EXHIBIT #22, CV OF DR. NANCY EISWIRTH

Finally, the plaintiffs seek to introduce Exhibit # 22 CV of Dr. Nancy Eiswirth. The defendants object to this Exhibit as it is hearsay.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted.” Fed.R.Evid. 801(c). Unless an exception applies, this type of statement is inadmissible. Fed.R.Evid. 802. A statement not offered for its truth is not hearsay, and is admissible if relevant and reliable. Hearsay has been traditionally rejected as substantive evidence because the declarant was not under oath and was not subject to cross-examination at the time the statement was made. See, generally 5 Wigmore on Evidence §§ 1362, 1367 (Chadbourn rev. 1974).

Here, the Curriculum Vitae of plaintiff’s expert witness is an out of court statement being offered in evidence to prove the truth of the matter asserted. Therefore, it is hearsay and inadmissible. Also, Dr. Nancy Eiswirth will be present at trial and can testify as to her qualifications and experience. Accordingly, Exhibit #22 should be precluded.

IV. CONCLUSION

For the foregoing reasons, the defendants request that Exhibits #13,20, 21 and 22 be precluded from trial.

JOHNMICHAEL O’HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on January 7, 2011, a copy of the foregoing Motion in Limine was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

EXHIBIT H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JANUARY 7, 2011

**PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE
DEFENDANTS FROM OFFERING CERTAIN IRRELEVANT EVIDENCE**

Pursuant to Rules 402 and 403 of the Federal Rules of Evidence, the plaintiffs, Glen Harris, individually and as guardian and next friend of K.H., a minor, hereby object to the defendants attempting to offer, at trial, any evidence relating to the following subjects which is irrelevant to the instant action, and prejudicial to plaintiffs:

1. Information that the Defendants Claim Was Conveyed by a Fellow Officer is Inadmissible, Since that Officer Denies Making the Statements.

The plaintiffs seek to preclude the defendants from offering any evidence relating to a conversation they claim occurred between Officer Gabriel Laureano and a suspect who was under arrest at the time, one George Hemingway. This evidence is both irrelevant and inadmissible hearsay. Furthermore, the defendants' assertion of what they say they were told about the conversation is directly contradicted by both Hemingway and Officer Laureano. Therefore, the defendants' mistaken (or false) assertion of what they claim they were told about the plaintiffs' property serves no purpose but to confuse the jury. It is also, therefore, rank hearsay under Fed. R. Evid. 802.

On December 20, 2006, prior to the actions that give rise to this complaint, Officer Laureano stopped and presumably arrested Mr. Hemingway on drug charges. According to Laureano, Hemingway was trying to avoid being arrested, and told Laureano that he had heard that there were guns stored in an abandoned vehicle in the backyard of a home on Enfield Street. Hemingway allegedly told Laureano that he did not know or recall the source of this information. Hemingway on the other hand denies

saying anything at all to Laureano about guns, or abandoned vehicles. The defendants were in the vicinity of the interaction between Laureano and Hemingway but state that they did not hear any conversation on the subject. They claim that Laureano told them what Hemingway said. It is undisputed that the defendants thereafter went to an address on Enfield Street in Hartford, purportedly given to them by Laureano, which turned out to be the plaintiffs' home. The defendants claim (falsely according to plaintiffs), that they believed that some sort of transaction involving gang members and guns was about to occur in the backyard of the home, and that is why they immediately entered the property without a warrant, guns drawn, and proceeded along the side of the house towards the backyard. It was after they arrived at the backyard that they spotted the Saint Bernard, and then turned and ran, causing the dog to run after them. The defendants' alleged state of mind at the time, particularly when based upon an erroneous or unsupported belief, cannot form the basis for any actions that these officers took on December 20, 2006. Moreover, the twin subjects of gun transactions and gangs have nothing to do with the claims in the complaint and are clearly the type of matters that will prejudice a jury. Indeed, whether or not either of the defendants is simply mistaken, or is outright lying about what they were told by Laureano, matters not, since none of it justifies any of their actions on December 20, 2006 on the plaintiffs' property and, therefore, should be precluded under Fed. R. Evid. 402 and 403.

The violation of plaintiffs' rights begins with the warrantless entry by these defendants, and the fact that the subsequent shooting and resultant damages all arise from this unconstitutional misconduct. The defendants argue that the fenced backyard is not curtilage and that, therefore, the plaintiffs had no expectation of privacy therein. To the extent this evidence is disputed – itself a question of law – it will be decided by the jury. However, the defendants have also claimed at deposition that they were justified in entering without a warrant because of a belief that exigent circumstances existed to prevent an imminent crime involving dangerous firearms, and that it was necessary to protect the community. They claim they received this information from fellow Officer Laureano.

The problem with the defendants' assertion, however, is that Laureano denies saying anything of the sort. Laureano claims that Hemingway provided unsubstantiated

vague information about the existence of guns in an abandoned car, but either unaware, declined or refused to reveal the source of his information. Hemingway, according to Laureano, was stopped with narcotics, and was not believed to be a credible informant. “A court must evaluate the objective reasonableness of the [defendants’] conduct ‘in light of . . . the information the . . . officers possessed.’” *Cerrone v. Brown*, 246 F.3d 194, 202 (2d Cir. 2002), quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Yet even “arguable probable cause” must “not be misunderstood to mean ‘almost’ probable cause.” *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007). In relation to probable cause under the fourth amendment, an officer’s subjective “state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.” *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), citing *Whren v. United States*, 517 U.S. 806, 812-13 (1996). See also, *Cerrone, supra*, 246 F.3d at 202, quoting *Anderson*, 483 U.S. at 641.

The “existence of probable cause need not be assessed on the basis of the knowledge of a single officer.” *Zellner v. Summering*, 494 F.3d 344, 369 (2d Cir. 2007). However, where the actual searching officer “lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify the . . . search was known by other law enforcement officials initiating or involved with the investigation,” then the search may be upheld under the “collective or imputed knowledge doctrine.” *Id.*, quoting *United States v. Colon*, 250 F.3d 130, 135 (2d Cir. 2001).

In *Colon, supra*, the court expanded on the collective knowledge doctrine, recognizing the fact that in large police departments, a particular officer might not be aware of all underlying facts that provide justification for a search or arrest, but “may nonetheless act reasonably in relying on information received by other law enforcement officials.” *Id.* However, Judge Arterton, sitting by designation in *Colon*, went on to note that the “primary focus in the imputed knowledge cases is whether the law enforcement officer initiating the search . . . on whose instructions or information the actual searching . . . officers relied, had information that would provide reasonable suspicion or probable cause to search . . .” *Id.* at 135-36. Since Laureano denied being the source of the specific information allegedly conveyed about an imminent “transaction” that was

supposedly going to go down in the plaintiffs' backyard, it leaves the basis for the defendants' imputed knowledge utterly without support.

Since the defendants' subjective belief about what was going on in the backyard has no factual basis at all, then testimony about their thought process is irrelevant and prejudicial. Consequently, such evidence should be barred.

2. O'Hare Subjective Belief that His Life was In Danger is Inadmissible.

For the same reasons that the defendants' subjective belief as to the existence of probable cause is irrelevant and inadmissible, any attempt by either defendant to assert that they "believed" that their life was in danger from the plaintiffs' pet, or thought that the barking dog was going to physically injure them, is similarly inadmissible and irrelevant. Since O'Hare is accused of having violated the fourth amendment by "taking" the dog's life, the determination of reasonableness must be based on objective facts.

Moreover, there is no state-of-mind requirement in Section 1983 cases independent of that necessary to set forth a violation of the underlying constitutional right at issue. *Daniels v. Williams*, 474 U.S. 327 (1986); *Parratt v. Taylor*, 451 U.S. 527 (1981).

The defendants can certainly testify as to what activities they claim they observed the dog engaged in. Some of the testimony will be contested by the minor plaintiff and their testimony is subject to normal credibility evaluation. However, it is irrelevant and prejudicial to suggest that the defendants felt that their lives were in danger and, therefore, presumably, O'Hare will claim that he acted in self-defense, even if his actions were objectively unreasonable. Therefore, the defendants' subjective state of mind is irrelevant.

THE PLAINTIFFS,

By /s/

Jon L. Schoenhorn
Jon L. Schoenhorn & Associates
Fed Bar # Ct00119
108 Oak Street
Hartford, CT 06106
(860) 278-3500
Fax: (860) 278-6392
civilrights@aol.com

EXHIBIT I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JANUARY 7, 2011

DEFENDANTS' PROPOSED JURY INTERROGATORIES

I. FOURTH AMENDMENT - ENTRY INTO PROPERTY

- A. Have the plaintiffs proved, by a preponderance of the evidence, that they had a reasonable expectation of privacy in area of their yard the officers entered, thereby making it curtilage?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Fourth Amendment claim of illegal entry onto their property, so now proceed to Section III. If your answer is "YES," proceed Section II.]

II. FOURTH AMENDMENT – ENTRY INTO PROPERTY - QUALIFIED IMMUNITY

- A. Do you find that the area of the plaintiffs property the officers entered was not fully enclosed by a fencing or some other barrier?

_____ Yes

_____ No

- B. Do you find that the plaintiffs did not take steps to protect the area of their property the officers entered from view?

_____ Yes

_____ No

- C. Do you find that the area of the plaintiffs property the officers entered did not harbor the intimate activities associated with the sanctity of a man's home and the privacies of life?

_____ Yes

_____ No

- D. Do you find that the area of the plaintiffs property the officers entered was visible from the street?

_____ Yes

_____ No

- E. Do you find that the area of the plaintiffs property the officers entered was open to or used by visitors?

_____ Yes

_____ No

- F. Do you find that the officers entered the plaintiffs property through an open gate in an urban neighborhood?

_____ Yes

_____ No

- G. Do you find that the plaintiffs property was surrounded by fencing that served only as a physical barrier and did not in any way restrict the line of sight between the plaintiffs yard and that of their neighbor's?

_____ Yes

_____ No

- H. Do you find that the rear area of the plaintiffs property was freely observable to the public and/or neighbors?

_____ Yes

_____ No

- I. Do you find that the plaintiffs property and their neighbors' property had side yards that were narrow and contiguous to each other?

_____ Yes

_____ No

[Proceed Section III.]

III. FOURTH AMENDMENT - KILLING OF DOG

- A. Did the plaintiffs' dog pose an imminent threat to the officers?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Fourth Amendment claim for killing their dog, so now proceed to Section V. If your answer is "NO," proceed Section IV.]

IV. FOURTH AMENDMENT - KILLING OF DOG – QUALIFIED IMMUNITY

- A. Do you find that the dog was lunging at the officers?

_____ Yes

_____ No

- B. Do you find that the dog was growling at the officers?

_____ Yes

_____ No

- C. Do you find that the dog was snapping at the officers?

_____ Yes

_____ No

- D. Do you find that the dog was chasing the officers?

_____ Yes

_____ No

E. Do you find that the dog was showing its teeth at the officers?

_____ Yes

_____ No

F. Do you find that the dog was barking in an aggressive manner at the officers?

_____ Yes

_____ No

G. Do you find that the dog was acting aggressive towards the officers?

_____ Yes

_____ No

H. Do you find that O'Hare was unable to outrun the dog?

_____ Yes

_____ No

I. Do you find that O'Hare yelled at the dog in attempt to make it stop?

_____ Yes

_____ No

J. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare?

_____ Yes

_____ No

K. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to growl at O'Hare?

_____ Yes

_____ No

- L. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to snap at O'Hare?

_____ Yes

_____ No

- M. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to act aggressive towards O'Hare?

_____ Yes

_____ No

- N. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare, and O'Hare could not outrun the dog?

_____ Yes

_____ No

- M. Do you find that it was reasonable for O'Hare to fear that the dog had the potential to cause serious physical injury to himself or Officer Pia?

_____ Yes

_____ No

[Proceed Section V.]

V. DUE PROCESS

- A. Has the plaintiff established that the officers actions were so egregious, so outrageous, that they may fairly be said to shock the contemporary conscience, because they intended to cause the minor plaintiff emotional distress when O'Hare shot the dog?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Due Process claim, so now proceed to Section VII. If your answer is "YES," proceed Section VI.]

VI. DUE PROCESS – QUALIFIED IMMUNITY

A. Do you find that the dog was lunging at the officers?

_____ Yes

_____ No

B. Do you find that the dog was growling at the officers?

_____ Yes

_____ No

C. Do you find that the dog was snapping at the officers?

_____ Yes

_____ No

D. Do you find that the dog was chasing the officers?

_____ Yes

_____ No

E. Do you find that the dog was showing its teeth at the officers?

_____ Yes

_____ No

F. Do you find that the dog was barking in an aggressive manner at the officers?

_____ Yes

_____ No

G. Do you find that the dog was acting aggressive towards the officers?

_____ Yes

_____ No

H. Do you find that O'Hare was unable to outrun the dog?

_____ Yes

_____ No

I. Do you find that O'Hare yelled at the dog in attempt to make it stop?

_____ Yes

_____ No

J. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare?

_____ Yes

_____ No

K. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to growl at O'Hare?

_____ Yes

_____ No

L. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to snap at O'Hare?

_____ Yes

_____ No

M. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to act aggressive towards O'Hare?

_____ Yes

_____ No

- N. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare, and O'Hare could not outrun the dog?

_____ Yes

_____ No

- M. Do you find that it was reasonable for O'Hare to fear that the dog had the potential to cause serious physical injury to himself or Officer Pia?

_____ Yes

_____ No

[Proceed Section VII.]

VII. FAILURE TO INTERVENE

- A. Do you find that O'Hare was violating the plaintiffs' constitutional rights when he shot and killed their dog?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Failure to Intervene claim, so now proceed to Section VIII. If your answer is "YES," proceed to Question B of this Section.]

- B. Did Pia have a reasonable opportunity to intervene under the circumstances to stop O'Hare from shooting the dog?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Failure to Intervene claim, so now proceed to Section VIII. If your answer is "YES," proceed to Section VIII.]

VIII. EMOTIONAL DISTRESS

- A. Have the plaintiffs proved that the defendants intended to inflict emotional distress; or that they knew or should have known that emotional distress was a likely result of their conduct?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Emotional Distress claim, so now proceed to Section IX. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved that the defendants' conduct was extreme and outrageous, meaning that the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Emotional Distress claim, so now proceed to Section IX. If your answer is "YES," proceed to Question C of this Section.]

- C. Have the plaintiffs proved that the defendants' conduct was the cause of the plaintiffs' distress?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Emotional Distress claim, so now proceed to Section IX. If your answer is "YES," proceed to Question D of this Section.]

- D. Have the plaintiffs proved that the emotional distress sustained was severe?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Emotional Distress claim, so now proceed to Section IX. If your answer is "YES," proceed to Section IX.]

IX. TRESPASS

- A. Have the plaintiffs proved invasion, intrusion or entry by the defendants affecting the plaintiff 'exclusive possessory interest?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Trespass claim, so now proceed to Section X. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved the defendants acted intentionally?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Trespass claim, so now proceed to Section X. If your answer is "YES," proceed to Question C of this Section.]

- C. Have the plaintiffs proved that the invasion, intrusion or entry by the defendants caused a direct injury?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Trespass claim, so now proceed to Section X. If your answer is "YES," proceed to Question D of this Section.]

- D. Were the officers on the premises in the discharge of their official duties, making them licensees?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Trespass claim, so now proceed to Section X. If your answer is "NO," proceed to Section X.]

X. CONVERSION

- A. Have the plaintiffs proved they had ownership, possession or control over the dog before its conversion?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Conversion claim, so now proceed to Section XI. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved the defendants exercised an unauthorized dominion over the dog, to the alteration of its condition or to the exclusion of the plaintiffs rights?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Conversion claim, so now proceed to Section XI. If your answer is "YES," proceed to Section XI.]

XI. NEGLIGENCE – GOVERNMENTAL IMMUNITY

- A. Do you find that either of the plaintiffs were identified to any of the defendants as being at imminent risk of harm at the time the officers entered the plaintiffs' property?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Negligence claim, so now proceed to Section XIV. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved, by a preponderance of the evidence, that there was a public official to whom it was apparent that his or her conduct was likely to subject the plaintiffs to the harm at the time the officers entered the plaintiffs' property?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Negligence claim, so now proceed to Section XIV. If your answer is "YES," proceed to Section XII.]

XII. NEGLIGENCE

- A. Have the plaintiffs proved, by a preponderance of the evidence, that the defendants breached the duty of care owed to them by entering the property without a license to do so?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Negligence claim, so now proceed to Section XIV. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved, by a preponderance of the evidence, that the defendants' breach of that duty was the proximate cause of their injuries?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Negligence claim, so now proceed to Section XIV. If your answer is "YES," proceed to Question C of this Section.]

- C. Have the defendants proved, by a preponderance of the evidence, that they were justified to use physical force to defend themselves against what they believed to be the use or imminent use of physical force in accordance with C.G.S. § 53a-19?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Negligence claim, so now proceed to Section XIV. If your answer is "NO," proceed to Section XIII.]

XIII. COMPARATIVE NEGLIGENCE

- A. Have the defendants proved, by a preponderance of the evidence, that the plaintiffs' own negligence contributed to their injuries?

_____ Yes

_____ No

[If your answer is "NO," go to Section XIV. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the defendants proved, by a preponderance of the evidence, that the plaintiffs' own negligence was greater than the negligence of the defendants?

_____ Yes

_____ No

[If your answer is "NO," go to Section XIV. If your answer is "YES," proceed to Question C of this Section.]

- C. State the percentage (0% to 100%) the plaintiff contributed to her injuries:

_____ %

[Proceed to the next Section.]

XIV. RECKLESSNESS

- A. Have the plaintiffs proven, by a preponderance of the evidence, that the officers were reckless, that is, their conduct took on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger was apparent, and was more than a mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Recklessness claim. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the defendants proved, by a preponderance of the evidence, that they were justified to use physical force to defend themselves against what they believed to be the use or imminent use of physical force in accordance with C.G.S. § 53a-19?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XV below, based upon their Recklessness claim. If your answer is "NO," proceed to Section XV.]

XV. DAMAGES

[DO NOT complete this Section if your responses to all of the previous Sections indicate that the plaintiffs ARE NOT entitled to Damages. Complete this Section ONLY if you found that the plaintiffs ARE entitled to DAMAGES under any of the previous Sections.]

- A. Have the plaintiffs sustained damages as a result of the defendants' actions?

_____ Yes

_____ No

[If your answer is "NO," end your deliberations. If your answer is "YES," proceed to Question B of this Section.]

- B. State the amount of compensatory damages, if any, the plaintiffs have proven:

Medical Expenses..... \$ _____

Property Damage..... \$ _____

Pain and Suffering..... \$ _____

Total \$ _____

- C. State the amount of punitive damages, if any, the plaintiffs have proven as to each defendant:

Defendant O'Hare \$ _____

Defendant Pia \$ _____

- D. Calculate the total amount of damages (Section B plus Section C) here:

TOTAL DAMAGES \$ _____

[Your deliberations are over. Sign and date the verdict form and indicate to the court security officer that you have completed your deliberations.]

Date: _____

Signature of Jury Foreperson

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on January 7, 2011, a copy of the foregoing Proposed Jury Interrogatories was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

EXHIBIT J

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JANUARY 7, 2011

PLAINTIFFS' PROPOSED JURY INTERROGATORIES

I. FOURTH AMENDMENT – SEARCH OF PROPERTY

A. Did the plaintiffs have a reasonable expectation of privacy in areas of their yard that were entered by the defendants resulting in a violation of the plaintiffs' fourth amendment right against an illegal search? Answer by placing a check mark in the blank that states your finding:

_____ Yes

_____ No

[If you answer NO, go to Question II. If you answer yes, complete sections B & C]

B. Did the defendants act jointly and/or in a conspiracy, to violate the fourth amendment rights of the plaintiffs?

_____ Yes

_____ No

C. What amount, if any do you find for the plaintiff Glen Harris as compensatory damages for the fourth amendment illegal search?

Answer in Dollars or NONE: \$ _____

D. What amount, if any, do you find for the plaintiff K.H. as compensatory damages for the fourth amendment illegal search?

Answer in Dollars or NONE: \$ _____

II. FOURTH AMENDMENT - KILLING OF DOG

- A. Did the plaintiffs prove that one or both of the defendants unconstitutionally seized the plaintiffs' dog in violation of the fourth amendment?

Defendant O'Hare _____ Yes _____ No

Defendant Pia _____ Yes _____ No

[If your answer is NO, go to Question III. If you answer yes, complete sections B, C and D]

- B. Did the defendants act jointly and/or in a conspiracy, to violate the fourth amendment rights of the plaintiffs against unlawful seizures?

_____ Yes

_____ No

- C. What amount, if any do you find for the plaintiff Glen Harris as compensatory damages for the fourth amendment seizure of the dog?

Answer in Dollars or NONE: \$ _____

- D. What amount, if any, do you find for the plaintiff K.H. as compensatory damages for the fourth amendment seizure of the dog?

Answer in Dollars or NONE: \$ _____

III. DUE PROCESS

- A. Have the plaintiffs proven by a preponderance of the evidence that Defendant O'Hare's conduct shocked the contemporary conscience, and therefore violated plaintiffs' substantive due process rights?

_____ Yes

_____ No

[If your answer is NO, go to Question IV. If you answer yes, complete section B]

- B. What amount, if any do you find for the plaintiffs as compensatory damages for the fourteenth amendment due process violation?

Answer in Dollars or NONE: \$ _____

IV. FAILURE TO INTERVENE

- A. Did the Plaintiffs prove that Defendant Pia had a reasonable opportunity to intervene under the circumstances to prevent Defendant O'Hare from shooting or killing their dog?

_____ Yes

_____ No

[If your answer is NO, go to Question V. If you answer yes, complete section B]

- B. What amount, if any do you find for the plaintiffs as compensatory damages for the failure of Defendant Pia to intervene?

Answer in Dollars or NONE: \$ _____

V. EMOTIONAL DISTRESS

- A. Did the plaintiffs prove that the conduct of Defendant O'Hare constituted the intentional infliction of emotional distress?

_____ Yes _____ No

[If your answer is NO, go to Question VI. If you answer yes, complete section B]

- B. What amount, if any do you find for the plaintiffs as compensatory damages for the intentional infliction of emotional distress?

Answer in Dollars or NONE: \$ _____

VI. TRESPASS

- A. Have the plaintiffs proved that one or both of the defendants committed a trespass on their property?

Defendant O'Hare _____ Yes _____ No

Defendant Pia _____ Yes _____ No

[If your answer is NO, go to Question VII. If you answer yes, complete section B]

B. What amount, if any do you find for the plaintiffs as compensatory damages for the intentional infliction of emotional distress?

Answer in Dollars or NONE: \$ _____

VII. CONVERSION

A. Have the plaintiffs proved that one or more of the defendants exercised unauthorized dominion over their dog, and thereby committed the tort of conversion?

Defendant O'Hare _____ Yes _____ No

Defendant Pia _____ Yes _____ No

[If your answer is NO, go to Question VIII. If you answer yes, complete section B]

B. What amount, if any do you find for the plaintiffs as compensatory damages for the conversion?

Answer in Dollars or NONE: \$ _____

VIII. NEGLIGENCE

A. Have the plaintiffs proved that one or both of the defendants were negligent?

Defendant O'Hare _____ Yes _____ No

Defendant Pia _____ Yes _____ No

[If your answer is NO, go to Question IX. If you answer yes, complete section B]

B. What amount, if any do you find for the plaintiffs as compensatory damages for the defendants' negligence?

Economic Damages..... \$ _____

Non-Economic Damages..... \$ _____

Subtotal \$ _____

VIII. RECKLESSNESS/WANTON CONDUCT

- A. Have the plaintiffs proven, by a preponderance of the evidence, that the defendants were reckless or wanton in their conduct on December 20, 2006?

Defendant O'Hare _____ Yes _____ No

Defendant Pia _____ Yes _____ No

[If your answer is NO, go to Question IX. If you answer yes, complete section B]

- B. What amount, if any do you find for the plaintiffs as compensatory damages for the defendants' reckless conduct?

Answer in Dollars or NONE: \$ _____

IX. CONNECTICUT CONSTITUTIONAL VIOLATION

- A. Have the plaintiffs proven, by a preponderance of the evidence, that one or both of the defendants violated their rights under the Connecticut Constitution?

Defendant O'Hare _____ Yes _____ No

Defendant Pia _____ Yes _____ No

[If your answer is NO, go to Question X. If you answer yes, complete section B]

- B. What amount, if any do you find for the plaintiffs as compensatory damages for the violation of the Connecticut Constitution?

Answer in Dollars or NONE: \$ _____

X. INDEMNIFICATION

Do you find that the City of Hartford should indemnify the defendant officers for any damages that you find against them?

_____ Yes _____ No

XI. PUNITIVE DAMAGES

[DO NOT complete this Section if your responses to Sections I through IV indicate that the plaintiffs ARE NOT entitled to Damages, including nominal

damages. Complete this Section ONLY if you found that the plaintiffs ARE entitled to DAMAGES (including nominal damages) under Sections I through IV.]

- A. State the amount of punitive damages, if any, that you award to Glen Harris as to each defendant:

Defendant O'Hare \$ _____

Defendant Pia \$ _____

- B. State the amount of punitive damages, if any, that you award to K.H. as to each defendant:

Defendant O'Hare \$ _____

Defendant Pia \$ _____

[Your deliberations are over. Sign and date the verdict form and indicate to the court security officer that you have completed your deliberations.]

Date: _____

Signature of Jury Foreperson

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA, and CITY OF HARTFORD	:	MAY 4, 2012

AMENDED JOINT TRIAL MEMORANDUM

The Defendants, O'HARE and PIA, hereby file this Amended Joint Trial memorandum, seeking to add exhibits to O'Hare and Pia's Trial Exhibits, add jury instructions to O'Hare and Pia's Proposed Jury Instructions and add jury interrogatories to O'Hare and Pia's Proposed Jury Interrogatories. Counsel for O'Hare and Pia corresponded with plaintiff's counsel regarding the proposed additions. Counsel for the plaintiffs objects to the proposed additions to the jury instructions and jury interrogatories. Counsel for O'Hare and Pia was unable to ascertain plaintiff's counsel's position on the additional photographs. Therefore, the Defendants file this Amended Trial Memorandum along with O'Hare and Pia's Amended Proposed Jury Instructions and O'Hare and Pia's Amended Proposed Jury Interrogatories.

The additional Trial Exhibits are three photographs, which will be O'Hare and Pia's Trial Exhibits 18, 19 and 20 and are of pictures of the plaintiff's dogs, the deceased dog and the scene of the shooting. Said photographs were produced by the plaintiffs during discovery. The proposed additional jury instructions can be found in O'Hare and Pia's Amended Proposed Jury Instructions attached as **Amended Exhibit E** and found at paragraphs 31 through 44, and paragraph 56. The proposed additional jury interrogatories can be found in O'Hare and Pia's Amended Proposed Jury Interrogatories attached as **Amended Exhibit I** and found in Section III through VI.

I. CERTIFICATION

The undersigned counsel certify that this Joint Trial Memorandum is the product of consultation between the lawyers who will be trying the case.

II. TRIAL COUNSEL

A. PLAINTIFFS - GLEN HARRIS, INDIVIDUALLY AND P.P.A. AS GUARDIAN FOR K.H., A MINOR CHILD
Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street

Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

B. DEFENDANTS - JOHNMICHAEL O'HARE AND ANTHONY PIA

Thomas R. Gerarde (ct05640)
Alan R. Dembiczak (ct25755)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com
E-mail: adembiczak@hl-law.com

C. DEFENDANT - CITY OF HARTFORD

Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
E-mail: Feoln001@hartford.gov

III. JURISDICTION

This action is brought pursuant to Title 42, United States Code §§ 1983 and 1988, and the fourth and fourteenth amendments to the United States Constitution. Jurisdiction is founded upon Title 28, United States Code §§ 1331 and 1342; and the aforementioned statutory and constitutional provisions. Plaintiff also invokes the supplemental jurisdiction of this court to hear and determine claims arising under Connecticut state law and its constitution, pursuant to Title 28, United States Code § 1367.

IV. JURY/NON-JURY

This case is to be tried before a jury.

V. NATURE OF THE CASE

A. PLAINTIFFS' DESCRIPTION

This action, brought by a homeowner and his minor daughter, arises out of events on December 20, 2006, when the defendant Hartford police officers entered into the plaintiffs' yard on Enfield Street without a warrant and shot and killed the family dog.

The plaintiffs assert that the entry and subsequent killing of their dog was an illegal search and seizure under the Fourth Amendment; that killing the dog in front of

the minor plaintiff violated the Fourteenth Amendment's guarantee of substantive due process; that the defendants' actions violated the Connecticut State Constitution, Article I, Section 7; that killing the dog in front of the minor plaintiff constituted the intentional infliction of emotional distress; the defendants' entry onto the property constituted a trespass; that killing the dog constituted conversion; that the defendants were negligent in entering the property without a warrant or valid exception to the warrant requirement; and that the City of Hartford should indemnify the individual defendants and pay all damages on their behalf to the plaintiffs.

The plaintiffs seek monetary and other relief to compensate them for the loss of the damages suffered by them, including loss of dog and resultant emotional distress.

B. DEFENDANTS' DESCRIPTION

Acting on a tip that there were two handguns in an abandoned vehicle in the backyard of 297 Enfield Street in Hartford, CT, Hartford Police Officers O'Hare and Pia reported to the residence. When they arrived they entered the front yard through an open gate in a chain link fence. They then walked along the side of the three family house that was located on the property, and when they reached the rear corner of the house, peeked around the corner.

They observed a large white and brown dog exiting a hole in a wooden fence located at the southwest corner of the rear yard that began to growl at the officers, "showing its teeth". The large dog then charged towards the officers, growling and barking in an aggressive manner.

The officers began to retreat, running towards the front yard with Officer Pia in front and Officer O'Hare behind, with the large dog directly behind both. The dog continued to charge at the officers, snapping its teeth in an aggressive manner. Officer Pia was able to exit the front yard through the open, unsecured front gate but Officer O'Hare was unable to find an avenue of escape due to the animal's close proximity, and therefore turned around facing the animal while it was still charging at him. Officer O'Hare then drew his department issued firearm and pointed it in the direction of the charging dog and yelled, "Get back", several times in an attempt to stop the animal's charge. The dog hesitated momentarily and then continued his charge, growling and snapping his teeth, as it approached Officer O'Hare. The dog was approximately three feet away from Officer O'Hare who had no safe avenue of escape. Fearing the dog had the potential to cause serious physical injury to himself or Officer Pia, Officer O'Hare checked his backdrop and insured it was clear, not posing a danger to any persons. Officer O'Hare then aimed his department issued firearm downward at the large dog and fired three rapid gunshots killing the dog.

VI. STIPULATIONS OF FACTS AND LAW

A. STIPULATIONS OF FACTS AND LAW

1. The plaintiff, Glen Harris, and his daughter, K.H., have been, at all times relevant to this complaint, citizens of the United States and residents of the City of Hartford, Connecticut. K.H. is a minor child.
2. This court has personal and subject matter jurisdiction over the parties and their claims.

3. On or about the date relevant to this complaint, December 20, 2006, the defendants, Johnmichael O'Hare and Anthony Pia, were municipal employees of the City of Hartford, Connecticut, employed as police officers for the City.
4. At all times relevant hereto, and in all their actions described herein, Defendants O'Hare and Pia were acting under color of state law, regulation and/or custom, and under color of their authority as a municipal employees of the City of Hartford, Connecticut.
5. The defendant City of Hartford is a municipal corporation, incorporated under the laws of the State of Connecticut, with powers to employ police officers.
6. On December 20, 2006, the minor plaintiff K.H. was twelve years old.
7. While on the plaintiffs' property located at 297 Enfield Street in the City of Hartford on or about December 20, 2006, the defendants encountered the plaintiffs' St. Bernard dog.
8. While on the plaintiffs' property, Defendant O'Hare shot the plaintiffs' St. Bernard dog, with his department issued service pistol.
9. The plaintiffs' dog died as a result of one or more gunshot wounds inflicted by Defendant O'Hare.
10. The plaintiffs mailed a Notice of Intent to Sue regarding the circumstances of this complaint to the Town Clerk of the City of Hartford on or about April 9, 2007, and the Town Clerk received said Notice of Intent to Sue on or about April 10, 2007.
11. If the defendants are liable to plaintiffs for any damages as a result of violations of tort or civil rights, the City of Hartford will indemnify the named defendants in accordance with C.G.S. §§7-101a and 7-465.

VII. PLAINTIFFS' CONTENTIONS

A. First Cause of Action: Illegal Search and Seizure under the Fourth Amendment

On December 20, 2006, the plaintiff Glen Harris, resided with his family, including K.H., his 12 year old daughter, at a house owned by him and located at 197 Enfield Street in the City of Hartford. At approximately 3 p.m., the defendants, dressed in police uniforms, entered the plaintiffs' property unlawfully and without a warrant or other legal justification, and with guns drawn. Seeking to avoid detection, the defendants stealthily moved across the plaintiffs' front yard, then along the side of the house and into the rear yard, where the minor plaintiff was outside playing with her St. Bernard dog. The dog alerted to the presence of strangers in the rear yard, at which point the defendants turned and ran back towards the front yard, causing the dog to follow after the defendants. Defendant Pia exited the front yard, but defendant O'Hare turned to face the dog, and then shot his weapon three times, killing the dog in front of the 12-year-old plaintiff.

The plaintiffs contend that the defendants violated the Fourth Amendment's protections against unreasonable searches because the yard surrounding the plaintiffs' house constituted the curtilage of the home itself, entitled to heightened privacy consideration. Furthermore, the defendants did not have a warrant or a valid exception to the warrant requirement that would grant them the legal right to enter the property. Finally, the defendants did not have any right to shoot and kill the plaintiffs' dog, which constituted an illegal and unjustified seizure.

B. Second Cause of Action: Violation of the Fourteenth Amendment's Due Process Clause by Defendant O'Hare

The plaintiffs further contend that while the defendants and the dog were moving along one side of the house, the minor plaintiff ran toward the front yard along the opposite side of the house. The child heard defendant O'Hare fire two shots before she arrived in the front yard. When she reached the front yard, she saw her pet dog lying on the ground, still panting and wagging his tail. She also saw defendant O'Hare standing over her wounded pet, pointing his gun at the dog. The minor plaintiff screamed "No, don't shoot my dog!" Defendant O'Hare looked at the minor plaintiff, looked back at the dog, and then fired his weapon a third time, fatally shooting the dog. After the minor plaintiff ran to the body of her dog, crying and visibly upset, defendant O'Hare told her, "Sorry, miss, but your dog isn't going to make it."

This conduct violated the Fourteenth Amendment's Due Process Clause, because Defendant O'Hare's action shocks the conscience and offends fundamental democratic notions of fair play and liberty by maliciously executing a family pet in front of a child.

C. Third Cause of Action: State Constitutional Violation, Article I, § 7 By Defendants O'Hare and Pia

The plaintiffs contend that defendants' conduct described in the previous two sections also violates the Connecticut Constitution, Article First, § 7.

D. Fourth Cause of Action: Intentional Infliction of Emotional Distress Against Defendant O'Hare

Plaintiffs contend that Defendant O'Hare's conduct as described under the Second Cause of action also forms the basis of a cause of action for intentional infliction of emotional distress.

E. Fifth Cause of Action: Trespass Claim Against Defendants O'Hare and Pia

The plaintiffs contend that defendants' conduct described in the First Cause of Action also forms the basis for a claim of trespass under Connecticut law.

F. Sixth Cause of Action: Conversion Claim Against Defendant O'Hare

The plaintiffs contend that defendants' conduct described in the First and Second Causes of Action also forms the basis for a claim in common law conversion.

G. Seventh Cause of Action: Negligence claim against Defendants O'Hare, Pia, and the City of Hartford

The plaintiffs contend that the defendants' conduct described in the First Cause of Action also forms the basis for a claim in common law negligence.

H. Eighth Cause of Action: Indemnification against the City of Hartford

On April 9, 2007, the plaintiffs sent a Notice of Intent to Sue to the Town Clerk of the City of Hartford, which was duly received on April 10, 2007. Therefore, the City of Hartford is obligated to indemnify the individual defendants under Connecticut General Statutes §§7-101a and 7-465.

VIII. DEFENDANTS' CONTENTIONS

On December 20, 2006, two officers of the Hartford police arrested a Mr. Hemmingway at 717 Garden Street with several bags of heroin on his person. Mr. Hemmingway informed the officers that in the rear of 297 Enfield Street there was an abandoned gray vehicle that contained two guns. Hemmingway would not say how he knew about the guns, but stated that they were located in the vehicle.

Hartford Police Officers O'Hare and Pia reported to the residence. When they arrived they entered the front yard through an open gate in a chain link fence. They then walked along the side of the three family house that was located on the property, and when they reached the rear corner of the house, peeked around the corner.

Before entering the back yard they saw the dog, turned around and ran. This area of the yard they entered was not enclosed, and the plaintiffs took no steps whatsoever to protect said area from entry or from view.

There was no fence that enclosed the property, and in fact, the front gate to the chain link fence was left open. Along the edge of the front yard of the property was an approximate 4 foot high chain link fence with multiple openings. The chain link fence had a large opening where the driveway was located. There was also a gate in the chain link fence leading to the front door, which was left open. Additionally, there was no fence or barrier blocking ones view of or path of travel to either the front yard or backyard. Furthermore, there was a portion of fencing on the side of the property that was knocked down. Finally, there was no fence or barrier separating the front yard from the backyard.

Further, neither the front nor back yard was enclosed by fencing or some other barrier, there was a large opening in the front fence where the driveway was located, and the front gate was left open. There was also no fencing or other barrier separating the front yard from the back yard. Further, there was no stockade or similar type fence in the front yard blocking ones view, but merely a chain link fence that was approximately 4 feet high, which does not block ones view of the yard. Finally, there were no "No trespassing" signs or anything to that effect to keep people out of the property.

The officers observed the large dog, the dog looked in their direction and began to growl and charge at them. As the officers were running, the large dog was growling, snapping and lunging at O'Hare. The dog was gaining on O'Hare, all the while continuing to snap, lunge and growl at O'Hare in an aggressive manner.

When the dog was only a few feet away from him, O'Hare turned around facing the dog, began to back-peddle and yell "get back" numerous times in an effort to stop the dog. The dog hesitated for a brief moment and then again began to growl, snap and lunge at O'Hare in an aggressive manner. The dog continued to gain on O'Hare, who determined that the dog was not going to stop and that he could not outrun the dog. Therefore, after making every effort to outrun the dog and get the dog to stop by yelling get back, O'Hare was left with no other choice than to shoot the dog as he believed that it was about to attack him. Officer O'Hare discharged three rapid succession shots into the dog stopping it instantly.

The Fourth Amendment claims fail as the entry into the yard was not a Fourth Amendment search, as the area of the plaintiffs' yard the officers entered was not curtilage and therefore there was no reasonable expectation of privacy in said area. Also, the killing of the dog was reasonable under the circumstances, as it posed an imminent threat to O'Hare. The substantive due process claims fail as the Fourth Amendment is the appropriate remedy and even if it were not, the actions of the officers did not shock the conscience. Also, the officer are entitled to qualified immunity.

The failure to intervene claim fails, as Officer Pia did not have a realistic opportunity to intervene and did not reasonably believe that the plaintiffs' rights were being violated, as the killing of the dog was justified. The Connecticut Constitution claim fails as it is not a recognized claim, and even if were, O'Hare's action of killing the dog was justified, as the dog posed an imminent threat.

The intentional infliction of emotional distress claim fails as there is no right to sue an individual for intentional infliction of emotional distress resulting from the death of a pet, and even if there was, the officers actions were not extreme and outrageous. The trespass claim fails as the officers were performing official duties and therefore licensees. The conversion claim fails as the officers did not exercise an unauthorized dominion over the dog given that their actions were justified. Finally, the negligence claim fails as the officers are entitled to governmental immunity, and the defendants did not breach any duty owed to the plaintiffs.

IX. LEGAL ISSUES

- A. Whether the area of the plaintiffs' yard the officers entered was curtilage?
- B. Whether the dog posed an imminent threat to the officers?
- C. Whether the officer are entitled to qualified immunity on the Fourth Amendment claims?
- D. Whether the plaintiffs have a viable substantive due process claim?
- E. Whether the actions of the officers shocked the contemporary conscience?
- F. Whether the officer are entitled to qualified immunity on the substantive due process claim?
- G. Whether officer Pia had a realistic opportunity to intervene?
- H. Whether the plaintiff has a viable claim under the Connecticut Constitution?
- I. Whether the officers entry into the property and killing of the dog was justified under the Connecticut Constitution?

- J. Whether the officer are entitled to qualified immunity on the Connecticut Constitution claim?
- K. Whether Connecticut recognizes a right to sue an individual for intentional or negligent infliction of emotional distress resulting from injury to property, such as a pet?
- L. Whether the officers' actions were extreme and outrageous?
- M. Whether the officers were not trespassers, but licensees?
- N. Whether the officers exercised an unauthorized dominion over the dog, amounting to a conversion?
- O. Whether the officers are entitled to governmental immunity?
- P. Whether the plaintiffs have proved their claims of negligence?
- Q. Whether the officers actions were reckless?
- R. Whether the defendants acted jointly or conspired with each other?
- S. Whether the defendants violated the plaintiffs' Fourth Amendment rights?
- T. Whether the defendants violated the plaintiffs' Fourteenth Amendment rights?
- U. Whether the defendants violated Connecticut Constitution, Art I, Sec. 7?
- V. Whether the defendants committed the torts of trespass, conversion, intentional infliction of emotional distress and/or negligence?

X. VOIR DIRE QUESTIONS

The Plaintiffs' Proposed Voir Dire Questions are attached as **Exhibit A**, O'Hare and Pia's Proposed Voir Dire Questions are attached as **Exhibit B** and City of Hartford's Proposed Voir Dire Questions are attached as **Exhibit C**.

XI. WITNESSES

A. PLAINTIFFS' WITNESSES

- 1. **Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in his complaint, including the facts, his home ownership, and damages suffered. Anticipated testimony will last three hours
- 2. **K. H., daughter of Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in her complaint, including the facts contained in the complaint, their impact on her, and damages suffered. Two hours
- 3. **Tashona Ayers**, 297 Enfield Street, Hartford, CT. Ms. Ayers is a resident of 297 Enfield Street and will testify about some of the events that occurred as described in the complaint, having been present at the location on December 20, 2006, including its effect on the emotional state of the minor plaintiff that day and subsequently. Two hours
- 4. **K. Deering, DVM**, Storrs, CT. Dr. Deering performed the veterinary necropsy on the plaintiffs' dog and is likely to have information regarding observations, the cause of death and the

dog's general health at the time of death. The veterinary examination of the dog may be introduced through a records keeper for the University of Connecticut School of Veterinary Medicine. One hour

5. **R. French, DVM, PhD**, Storrs, CT. Dr. French performed the veterinary necropsy on the plaintiffs' dog and may testify concerning his observations and findings concerning same. One hour
6. **CT DVM**, Recordskeeper re: necropsy observations and findings. Storrs, CT. A recordskeeper will be called unless a stipulation is reached. Half Hour
7. **Nancy A. Eiswirth, Ph. D.**, 664 Prospect Avenue, Hartford, CT. Dr. Eiswirth evaluated and treated the minor plaintiff for mental distress after the defendants' encounter with the plaintiff on December 20, 2006, will offer both factual and expert testimony regarding the emotion distress suffered by the plaintiff, including the need for subsequent mental health treatment, caused by the defendants' conduct. She will also offer an expert opinion regarding the child's emotional condition and diagnosis of post-traumatic stress syndrome as being proximately caused by the defendants' conduct, including her subsequent psychiatric hospitalization and outpatient care. Her opinions will be based upon the information disclosed in the plaintiffs' disclosure of expert testimony. Two hours
8. **Recordskeeper, WFSB-TV (or designee)**, Rocky Hill. CT. A representative of WFSB-TV may be called to authenticate news footage of the scene as it was recorded on December 20, 2006, unless stipulation reached. Half hour
9. **Recordskeeper, Hartford Police Department**. A representative of the communications division of the HPD may be called to authenticate radio communications from the defendants and various officers who were at or called to 297 Enfield Street, Hartford on December 20, 2006 and to explain how transmissions are captured and recorded. Half hour
10. **Sgt. Gabriel Laureano**, Hartford Police Department, Hartford, CT. Sgt. Laureano may testify about his interactions with a suspect named George Hemingway prior to the defendants' arrival at 297 Enfield Street, and his communications with the defendants. He will also testify as to his observations at 297 Enfield Street that day. Sgt. Laureano is expected to testify that he did not tell either of the defendants that he had reason to believe that some type of illegal transaction between individuals was about to occur or was occurring on December 20, 2006 at plaintiffs' property at 297 Enfield Street. Said testimony will also be used in anticipated impeachment of contrary claims by the defendants about what

Laureano told them, unless defendants' testimony is barred. One hour

11. **George Hemingway**, DOC. If the defendants attempt to elicit statements allegedly attributable to Mr. Hemingway, then the plaintiffs may call Mr. Hemingway to deny making the statements in question. One hour
12. **Sgt. Shawn St. John**, Hartford Police Department. Sgt. St. John is expected to testify to his observations on Enfield Street on the date of the incident, and to statements made by the defendants. One hour
13. **Ramon Baez Sr. and/or Carlos Ocasio**, Hartford Police Department. One or both of these police detectives will testify to their observations at the scene on the date of the incident, and to their retrieval and recovery of certain items relevant to the investigation. Half hour (each)
14. **Officer Agostino**, Hartford Police Department. Officer Agostino will testify regarding his dispatch to Enfield Street on the date of the incident, to his observations at the plaintiffs' property, and to statements made by the defendants. One hour
15. **Recordkeepers for various medical providers who treated K.H.**, unless authenticity as business and/or hospital records is stipulated. ten minutes for each
16. **Recordskeeper, Children's Medical Center and IOL**, half hour.

B. O'HARE AND PIA'S WITNESSES

1. **Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in his complaint, including the facts, his home ownership, and damages suffered. It is anticipated that his testimony will last between two to three hours.
2. **K. H., daughter of Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in her complaint, including the facts contained in the complaint, their impact on her, and damages suffered. It is anticipated that her testimony will take approximately two to three hours.
3. **Tashona Ayers**, 297 Enfield Street, Hartford, CT. Ms. Ayers will testify about some of the events that occurred as described in the complaint. It is anticipated that her testimony will take approximately one to two hours.
4. **John Michael O'Hare**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.

5. **Anthony Pia**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
6. **Gabe Laureano**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
7. **Nancy A. Eiswirth, Ph. D.**, 664 Prospect Avenue, Hartford, CT. Dr. Eiswirth evaluated and treated the minor plaintiff for mental distress before and after the defendants' encounter with the plaintiff on December 20, 2006, will offer both factual and expert testimony regarding the emotion distress suffered by the plaintiff, including the need for subsequent mental health treatment, before and after the subject incident. She will also offer an expert opinion regarding the child's emotional condition and diagnosis of post-traumatic stress syndrome as being proximately caused by the defendants' conduct, including her subsequent psychiatric hospitalization and outpatient care, and any pre-existing conditions she had. It is anticipated that her testimony will last between two to three hours.
8. **Recordskeeper, Hartford Police Department**. A representative of the communications division of the HPD may be called to authenticate radio communications from the defendants and various officers who were at or called to 297 Enfield Street, Hartford on December 20, 2006.
9. **George Hemingway**, DOC. It is anticipated that Mr. Hemingway will testify as to the information he provided to the officers on the date of the incident. It is anticipated that his testimony will last between one to two hours.
10. **Sgt. Shawn St. John**, Hartford Police Department. Sgt. St. John is expected to testify to his observations on Enfield Street on the date of the incident, and to statements made by the defendants.
11. **Ramon Baez Sr. and/or Carlos Ocasio**, Hartford Police Department. One or both of these police detectives will testify to their observations at the scene on the date of the incident, and to their retrieval and recovery of certain items relevant to the investigation.
12. **Officer Agostino**, Hartford Police Department. Officer Agostino will testify regarding his dispatch to Enfield Street on the date of the incident, to his observations at the plaintiffs' property, and to statements made by the defendants.
13. **Recordskeeper, Children's Medical Center**.

C. CITY OF HARTFORD'S WITNESSES

1. **Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in his complaint, including the facts, his home ownership, and damages suffered. It is anticipated that his testimony will last between two to three hours.
2. **K. H., daughter of Glen Harris**, 297 Enfield Street, Hartford, CT 06112. The plaintiff will testify regarding the allegations in her complaint, including the facts contained in the complaint, their impact on her, and damages suffered. It is anticipated that her testimony will take approximately two to three hours.
3. **Tashona Ayers**, 297 Enfield Street, Hartford, CT. Ms. Ayers will testify about some of the events that occurred as described in the complaint. It is anticipated that her testimony will take approximately one to two hours.
4. **John Michael O'Hare**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
5. **Anthony Pia**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle in the rear of the plaintiffs' property, his entry into the property, the events that led to the killing of the dog and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
6. **Gabe Laureano**, 50 Jennings Road, Hartford, CT 06102. It is anticipated that he will testify about the information he had about there being two handguns in an abandoned vehicle and his other actions and observations on the night of the subject incident. It is anticipated that his testimony will last between one to two hours.
7. **Nancy A. Eiswirth, Ph. D.**, 664 Prospect Avenue, Hartford, CT. Dr. Eiswirth evaluated and treated the minor plaintiff for mental distress before and after the defendants' encounter with the plaintiff on December 20, 2006, will offer both factual and expert testimony regarding the emotion distress suffered by the plaintiff, including the need for subsequent mental health treatment, before and after the subject incident. She will also offer an expert opinion regarding the child's emotional condition and diagnosis of post-traumatic stress syndrome as being proximately caused by the defendants' conduct, including her subsequent psychiatric hospitalization and outpatient care, and any pre-existing conditions she had. It is anticipated that her testimony will last between two to three hours.

8. **Recordskeeper, Hartford Police Department.** A representative of the communications division of the HPD may be called to authenticate radio communications from the defendants and various officers who were at or called to 297 Enfield Street, Hartford on December 20, 2006.
9. **George Hemingway, DOC.** It is anticipated that Mr. Hemingway will testify as to the information he provided to the officers on the date of the incident. It is anticipated that his testimony will last between one to two hours.
10. **Sgt. Shawn St. John, Hartford Police Department.** Sgt. St. John is expected to testify to his observations on Enfield Street on the date of the incident, and to statements made by the defendants.
11. **Ramon Baez Sr. and/or Carlos Ocasio, Hartford Police Department.** One or both of these police detectives will testify to their observations at the scene on the date of the incident, and to their retrieval and recovery of certain items relevant to the investigation.
12. **Officer Agostino, Hartford Police Department.** Officer Agostino will testify regarding his dispatch to Enfield Street on the date of the incident, to his observations at the plaintiffs' property, and to statements made by the defendants.
13. **Recordskeeper, Children's Medical Center.**

XII. EXHIBITS

A. PLAINTIFFS EXHIBITS

1. Picture of Front Yard 1 (SJ-5)
2. Picture of Front Yard 2 (SJ-8)
3. Picture of Rear Yard (SJ-6)
4. Picture of Side of House (001_11.JPG)
5. Picture of Plaintiffs' Dogs (001_1.JPG)
6. Bill of Sale to plaintiff for St. Bernard puppy
7. Aerial View of 297 Enfield Street
8. Picture showing "Beware of Dog" Sign
9. Warranty deed for 297-99 Enfield Street
10. HPD Radio broadcasts from 12-20-06 with transcript
11. WFSB-TV news footage of scene
 - a. **OBJECTION:** Relevance. See Motion in Limine.
12. HPD Photo of evidence markers.
13. HPD Photo Evidence Marker 1.
14. HPD Photo Evidence Marker 2.
15. HPD Photo of Dog wide.
16. HPD Photo of Dog close up.
17. 12/20/06 Hartford Police Department Report of Animal Control Officer Jerry Cloutier.
18. Picture of dead St. Bernard (SJ-15)

19. X-rays taken by veterinary center of deceased dog.
20. Redacted Version of Necropsy Report– CT Vet. Medicine Diagnostic Laboratory, UConn
21. Bullet fragments recovered from dog during necropsy
 - a. **OBJECTION:** Relevance. See Motion in Limine.
22. Release of Items Form prepared by UConn Department of Veterinary Science
23. MacDonald Vet Hospital cremation bill
24. K.H. medical records and bills:
 - a. CT Children's Medical Center
 - b. Hartford Hospital
 - c. Institute of Living
 - d. Wheeler Clinic
 - e. Dr. Nancy Eiswirth, PhD (NAE Associates)
 - f. AMR Ambulance
 - g. Summary Exhibit with bill total
25. Hartford PD supplemental incident report from Case 06-31279 by defendant Pia
26. Notice of Intent to Sue to City of Hartford by plaintiff
27. Certified mail receipt re: notice of intent to sue
 - a. **OBJECTION:** Relevance. See Motion in Limine.
28. CV of Dr. Nancy Eiswirth
 - a. **OBJECTION:** Hearsay. See Motion in Limine.
29. Excerpts from Deposition of O'Hare (see listing below)
30. Excerpts from Deposition of Pia (see listing below)
31. Warrant Affidavit for George Hemingway's Arrest by Gabriel Laureano and defendant O'Hare (Version 1) (potential impeachment only)
32. Warrant Affidavit for George Hemingway's Arrest by Gabriel Laureano and defendant O'Hare (Version 2) (potential impeachment only)

B. O'HARE AND PIA'S EXHIBITS

1. These defendants incorporate all of the plaintiffs' exhibits that are not objected to.
2. Picture of North Side of 297 Enfield Street, Hartford, CT.
3. Picture of North Side of 297 Enfield Street, Hartford, CT.
4. Picture of North Side of 297 Enfield Street, Hartford, CT.
5. Picture of North Side of 297 Enfield Street, Hartford, CT.
6. Two Pictures of Front Yard of 297 Enfield Street, Hartford, CT.
7. Two Pictures of Backyard of 297 Enfield Street, Hartford, CT.
8. Picture of Driveway of 297 Enfield Street, Hartford, CT.
9. Picture of Front of 297 Enfield Street, Hartford, CT.
10. Picture of Backyard of 297 Enfield Street, Hartford, CT.
11. Two Pictures of Driveway of 297 Enfield Street, Hartford, CT.

12. Two Pictures of Front and Side Yard of 297 Enfield Street, Hartford, CT.
13. Road diagram in area of 297 Enfield Street.
14. Redacted Aerial Photo 1
15. Redacted Aerial Photo 2
16. Redacted Aerial Photo 3
17. Redacted Aerial Photo 4
18. Photo of Plaintiff's Two dogs
19. Two photos of dead dog
20. Two photos of scene of shooting

C. CITY OF HARTFORD'S EXHIBITS

1. This defendant incorporates all of the plaintiffs' exhibits that are not objected to.
2. Picture of North Side of 297 Enfield Street, Hartford, CT.
3. Picture of North Side of 297 Enfield Street, Hartford, CT.
4. Picture of North Side of 297 Enfield Street, Hartford, CT.
5. Picture of North Side of 297 Enfield Street, Hartford, CT.
6. Two Pictures of Front Yard of 297 Enfield Street, Hartford, CT.
7. Two Pictures of Backyard of 297 Enfield Street, Hartford, CT.
8. Picture of Driveway of 297 Enfield Street, Hartford, CT.
9. Picture of Front of 297 Enfield Street, Hartford, CT.
10. Picture of Backyard of 297 Enfield Street, Hartford, CT.
11. Two Pictures of Driveway of 297 Enfield Street, Hartford, CT.
12. Two Pictures of Front and Side Yard of 297 Enfield Street, Hartford, CT.
13. Road diagram in area of 297 Enfield Street.
14. Redacted Aerial Photo 1
15. Redacted Aerial Photo 2
16. Redacted Aerial Photo 3
17. Redacted Aerial Photo 4
18. Photo of Plaintiff's Two dogs
19. Two photos of dead dog
20. Two photos of scene of shooting

XIII. DEPOSITION TESTIMONY

The plaintiffs intend to offer the following portions of the defendants' depositions:

Defendant Pia:

<u>Page</u>	<u>Lines</u>
26	5-25
27	6-12
40	3-4
58	1-4

70	12-18
72	22-25
73	1-25
74	1-21
75	14-25
76	1

Defendant O'Hare:

<u>Page</u>	<u>Lines</u>
49	21-25
50	1-7
52	2-12
69	3-8
72	24-25
73	1-16
88	23-25
89	1-3
92	17-25
93	1-6, 16-25
94	1-2
97	18-25
98	1-18
99	12-25
106	4-12

The defendants' cross designations are as follows:

Defendant Pia:

<u>Page</u>	<u>Lines</u>
23	7-21
27	13-15
50	24-25
51	1-25
52	1-6
76	2-25
77	1-2

Defendant O'Hare:

<u>Page</u>	<u>Lines</u>
50	18-25
51	1-25
52	1
52	13-25

73 17-25
74 1-13
88 22
92 15-16
93 7-15

The plaintiffs object to the introduction of all of the portions of the defendants' own depositions as hearsay, it improper lay opinion testimony and irrelevant, except for Pia's testimony Page 52, lines 5-6 and O'Hare's testimony Page 73 lines 17-25; Page 74, lines 1-13; and Page 88, lines 22.. See, Fed. R. Evid. 403, 701 and 801-802.

XIV. JURY INSTRUCTIONS

See the parties' agreed upon jury instructions attached as **Exhibit D**. See O'Hare and Pia's proposed jury instructions attached as **Amended Exhibit E**. See Plaintiffs' proposed jury instructions attached as **Exhibit F**.

XV. ANTICIPATED EVIDENTARY PROBLEMS

See Pia and O'Hare's Motion in Limine attached as **Exhibit G**. See Plaintiffs' Motion in Limine attached as **Exhibit H**.

XVI. VERDICT FORM

Plaintiffs do not believe that the defendants are not entitled to have each element of each count set forth as a separate interrogatory before a verdict on any one count is rendered. The plaintiffs claim that such a task would make it overly complicated for the jury and unfair to plaintiffs.

See O'Hare and Pia's proposed verdict form attached as **Amended Exhibit I**. See Plaintiffs' proposed verdict form attached as **Exhibit J**.

XVII. TRIAL TIME

The parties estimate that trial will take approximately 4-6 days.

XVIII. FURTHER PROCEEDINGS

There is no need for any further proceedings prior to trial.

XIX. MAGISTRATE JUDGE

The plaintiffs consent to trial by magistrate. The defendants do not consent to trial by magistrate.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde (ct05640)
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

PLAINTIFF,
GLEN HARRIS, P.P.A.
and ANTHONY PIA

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (ct 00119)
Jon L. Schoenhorn and Associates
108 Oak Street
Hartford, CT 06106
Ph: (860) 278-3500
Fax: (860) 278-6393
E-mail: Civlrights@aol.com

DEFENDANT,
CITY OF HARTFORD

By /s/ Nathalie Feola-Guerrieri
Nathalie Feola-Guerrieri, Esq. (ct 17217)
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103
Ph: (860) 757-9700
Fax: (860) 722-8085 fax
E-mail: Feoln001@hartford.gov

AMENDED EXHIBIT E

3. This statute provides that any person may sue for relief in the form of money damages against a person or persons, who, acting under color of law, statute, ordinance, regulation or custom, deprives a plaintiff of any rights, privileges or immunities secured or protected by the Constitution or the laws of the United States. In order to prove his Section 1983 claim, the plaintiff must establish, by a preponderance of the evidence, each of the following elements:

4. One, that defendants acted under color of the authority of the State of Connecticut; two, that the defendants performed acts which deprived the plaintiff of his constitutional rights; and three, that such acts as you find violated the plaintiff's rights, if you find such, were the legal or proximate cause of damages sustained by the plaintiff.

5. It is not necessary that the plaintiff prove that defendants had a specific intent to deprive her of her civil rights. The plaintiff is entitled to relief if a defendant's acts were intended or were reckless, and if you find that such acts violated the plaintiff's constitutional rights. However, mere negligent conduct is never a basis for finding liability on a constitutional claim.

6. An act of an official is done "under color of authority" or "under color" of state law, if the act is done while the person is actually performing the state duties. There is no dispute in this case but that each defendant was acting "under color" of state law. Remember, the plaintiff must next prove what acts of defendants caused her to suffer the loss of a constitutional right.

FOURTH AMENDMENT

7. The complaint alleges that defendant O'Hare, while illegally remaining on the plaintiff's property, unlawfully seized the plaintiff's dog in violation of 42 U.S.C.

Section 1983 and the Fourth Amendment to the United States Constitution. The defendants allege that their entry into the property was justified as the plaintiffs did not have a legitimate expectation of privacy in the area the officers entered and the dog posed an imminent threat to the officers.

8. The Fourth Amendment states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

ENTRY INTO THE PROPERTY

9. The Fourth Amendment protects people, not places. Fourth Amendment protection requires that a person possess a legitimate expectation of privacy in the area searched. A Fourth Amendment “search,” does not occur unless the search invades an objector area where one has a subjective expectation of privacy that society is prepared to accept as objectively reasonable. In this regard, the home or an individual's “dwelling place” has been afforded a “heightened privacy interest.”

10. The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy. The place searched is highly relevant to the Fourth Amendment analysis because expectations of privacy in some places are afforded greater constitutional legitimacy than in others. An individual may not legitimately demand privacy for activities conducted out of doors in fields.

11. The Second Circuit has noted that the route which any visitor to a residence would use is not private in the Fourth Amendment sense. Similarly, a visual

observation of an object already exposed to public view is no search at all. No Fourth Amendment search occurs when an officer enters a home's driveway, walkway, porch, track of lawn used to reach the stairway or similar area that is accessible to the general public.

12. **Authority:** Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir.1985); United States v. Chadwick, 433 U.S. 1, 7 (1977)); Illinois v. Caballes, 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); California v. Ciraolo, 476 U.S. 207, 211 (1986); Katz v. United States, 389 U.S. 347, 360 (1967)); State v. Mooney, 218 Conn. 85, 94-95, *cert. denied*, 502 U.S. 919 (1991); Oliver v. United States, 466 U.S. 170, 178 (1984); United States v. Reyes, 283 F.3d 446, 465 (2d Cir.2002); Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(e), at 499 (3d ed.1996)); Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir.2004); Krause v. Penny, 837 F.2d 595, 597 (2d Cir.1988); United States v. Titemore, 437 F.3d 251, 259-60 (2d Cir.2006); Serby v. Town of Hempstead, No. 04-CV-901 (DRH)(MLO), 2006 WL 2853869, at *8 (E.D.N.Y. Sept. 30, 2006).

13. The heightened privacy interest afforded to a dwelling place extends to the “curtilage”, which has been described as an “area to which extends the intimate activity associated with the sanctity of a person's home and the privacies of life.” The law distinguishes between the curtilage-the land immediately surrounding the home and, thus, considered a part of it-which is entitled to Fourth Amendment protection, and the land outside the curtilage, which, though it might be on the same private property, is not so protected.

14. The concept of curtilage, unfortunately, evades precise definition.

Curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

15. The extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. The central component of this inquiry is whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life. The factors you must consider are: (1) the area's proximity to the main residence; (2) any enclosure of the property or area; (3) use of the property or area; and (4) steps taken to protect the property or area from view.

16. The definition of curtilage is based upon the particular premises and factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself, with a special focus on whether the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.

17. An individual must take affirmative steps to protect his privacy in his curtilage and his open fields-the real property beyond his curtilage. Government does conduct a search when it intrudes onto open fields that a reasonable person would expect to be private. Fences, gates, and no-trespassing signs generally suffice to apprise a person that the area is private. The yard in close proximity to house is not

part of curtilage where it is exposed to public view and no evidence that intimate activities associated with domestic life occurred there.

18. The extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. The Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable.

19. **Authority:** Oliver v. United States, 466 U.S. 170, 180 (1984); United States v. Schuster, 775 F.Supp. 297, 306 (W.D.Wis.1990); United States v. Dunn, 480 U.S. 294, 300 (1987); Hester v. United States, 265 U.S. 57, 59 (1924); United States v. Basile, 569 F.2d 1053, 1056 (9th Cir.1978); United States v. Shroyer, 1998 WL 1585819, at *3 (S.D.Ohio 1998); California v. Ciraolo, 476 U.S. 207, 212 (1986); Boyd v. United States, 116 U.S. 616, 630 (1886); United States v. Reilly, 76 F.3d 1271, 1275 (2d Cir.1996); United States v. Titemore, 437 F.3d 251, 258 (2d Cir.2006); State v. Costin, 168 Vt. 175, 182 (1998); State v. Hall, 168 Vt. 327, 331 (1998); State v. Kirchoff, 156 Vt. 1, 10 (1991); Simko v. Town of Highlands, 276 Fed.Appx. 39, 2008 WL 1925143 C.A.2 (N.Y); United States v. Reyes, 283 F.3d 446, 466-67 (2d Cir.2002); United States v. Williams, 219 F.Supp.2d 346, 360 (W.D.N.Y.2002); United States v. Hogan, 122 F.Supp.2d 358 (E.D.N.Y.2000).

20. There is no “mechanistic application” of any one factor. The central component of the curtilage question remains whether the area harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.

21. The distance between the residence and the area searched is only the beginning of the court's inquiry because the setting where the residence is located affects the analysis. Distance is just one of many factors to be weighed when determining the reach of the curtilage. The "touchstone" inquiry is whether a person had a reasonable expectation of privacy in the area searched. However, in a modern urban multifamily apartment house, the area within the curtilage is necessarily much more limited than in the case of a rural dwelling subject to one owner's control. No court has ever held that all areas within a parcel of residential property are proximate to the residence and thus curtilage.

22. There is no bright-line fence rule. While fencing configurations are important factors in defining curtilage, the primary focus is whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home. In analyzing the enclosure factor, the features of the property must be viewed in consideration of the context of the entire property. The nature of the area observed, its proximity to one's home, the extent of surrounding trees and shrubs, and the general setting of the area within the larger context of the total property are all relevant in assessing the reasonableness of an expectation of privacy.

23. A front lawn that is visible from the street and a porch that constitutes part of a principal entranceway has a diminished expectation of privacy. When a police officer enters private property for a legitimate law enforcement purpose and embarks only upon places visitors could be expected to go, observations made from such vantage points are not covered by the Fourth Amendment.

24. Despite some type of enclosure, a Fourth Amendment violation does not occur if the area in question is open to or used by visitors. There is no reasonable expectation to keep visitors out when a gate is left open in an urban neighborhood. Also, police entry through an open gate does not violate Fourth Amendment because the officers could reasonably believe that the gate provided the principal means of access to the apartment. Further, no Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways. Areas such as driveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interior of the house.

25. Under the actual use test, the courts must consider the actual intimate and private use made of the property. There must be some evidence that the area in question was used for intimate purposes that one might ordinarily conduct inside of one's home. A finding of curtilage cannot be supported absent evidence in the record that the area was designated and used for other intimate purposes that one might ordinarily conduct inside of one's home.

26. What a person chooses voluntarily to expose to public view loses its Fourth Amendment protection. Thus, any expectation of privacy in such an area is objectively unreasonable. In examining the existence of a barrier on the property, the main issue is to determine the extent that the barrier obstructs one's view.

27. Fencing that serves only as a physical barrier and does not in any way restrict the line of sight between the plaintiff's yard and that of his neighbor's, weighs against an expectation of privacy. Rear areas of one's property that are freely

observable to the public and/or neighbors, diminishes one's expectation of privacy. The extent to which an area is visible to the public weighs heavily in determining curtilage. A route along the driveway that is in full view of the street is outside of the curtilage. The fact that the side yards of two residences are narrow and contiguous to each other are highly relevant in determining expectation of privacy.

28. **Authority:** United States v. Titemore, 437 F.3d 251, 258 (2d Cir. 2006); United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996); United States v. Van Dyke, 643 F.2d 992, 994 (4th Cir. 1981); United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980); United States v. Hayes, 551 F.3d 138, 147-48 (2d Cir. 2008); United States v. Lace, 669 F.2d 46, 56 (2d Cir. 1982); United States v. Moffitt, No. 06-10032, 2007 WL 1814123, at *1 (5th Cir. June 22, 2007); United States v. Thomas, 120 F.3d 564, 571-72 (5th Cir. 1997); United States v. Taylor, 90 F.3d 903, 908-09 (4th Cir. 1996); United States v. Reyes, 283 F.3d 446, 465 (2d Cir. 2002); United States v. Reed, 733 F.2d 492, 501 (8th Cir. 1984); Krause v. Penny, 837 F.2d 595, 597 (2d Cir. 1988); Esmont v. City of N.Y., 371 F. Supp. 2d 202, 212 (E.D.N.Y. 2005); Fla. v. Riley, 488 U.S. 445, 452 (1989); Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir. 2004); United States v. Fields, 113 F.3d 313, 321 (2d Cir. 1997); Rakas v. Ill., 439 U.S. 128, 152 (1978).

29. Also, a policeman who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee. In fact, if the conditions for the exercise of a public duty exist, the occupier would not be privileged to exclude the officer. It has long been held that a police officer who makes such an entry onto private property, in the course of performing his official duties, is a licensee.

30. **Authority:** Roberts v. Rosenblatt, 146 Conn. 110 (1959); Haffey v. Lemieux, 154 Conn. 185 (1966); Wroniak v. Ayala, Superior Court, judicial district of Hartford, Docket No. 94 0544499 (June 13, 1995, Sheldon, J.); Furstein v. Hill, 218 Conn. 610, 615 (1991); State v. Plummer, 241 A.2d 198 (1967); State of Connecticut v. Alexander, Superior Court of Connecticut, Judicial District of Fairfield. No. CR060215063 (June 3, 2008, Hauser, J.)

31. If you find that the area of the yard the officers entered was curtilage, thereby implicating the Fourth Amendment, you must next determine if there are any applicable exceptions to the warrant requirement. The Fourth Amendment expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. The core premise underlying the Fourth Amendment is that warrantless searches of a home are presumptively unreasonable.

32. **Authority:** Payton v. New York, 445 U.S. 573, 584, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Kentucky v. King, — U.S. —, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011); Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); United States v. Hassock, 631 F.3d 79, 84 (2d Cir.2011); Groh v. Ramirez, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004)

33. However, this presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness. Accordingly, the warrant requirement is subject to certain reasonable exceptions.

34. **Authority:** Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); Michigan v. Fisher, 558 U.S. —, —, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009).

35. One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. This is known as the exigent circumstances exception to the warrant requirement.

36. **Authority:** Mincey v. Arizona, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

37. In determining whether exigent circumstances exist, the core question is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer, to believe that there was an urgent need to render aid or take action. In making this determination, you must examine the totality of the circumstances confronting law enforcement agents in the particular case.

38. **Authority:** United States v. Klump, 536 F.3d 113, 117-18 (2d Cir.2008), United States v. MacDonald, 916 F.2d 766, 769–70 (2d Cir.1990).

39. Another exception to the warrant requirement is the “community caretaker” exception, applicable when law enforcement authorities' actions are totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Community caretaking functions extend to measures to maintain the peace and quiet of a community. Safeguarding individuals and their property from harm

is the essence of the “community caretaking function” of the police. Police have a duty to protect both the lives and the property of citizens.

40. **Authority:** Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); Wisconsin v. Pinkard, 327 Wis.2d 346 (2010); South Dakota v. Opperman, 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); United States v. Rohrig, 98 F.3d 1506, 1522 (6th Cir.1996); United States v. Miner, 956 F.2d 397, 399 (2d Cir.1992); United States v. Markland, 635 F.2d 174, 176 (2d Cir.1980); United States v. Davis, 2007 WL 2301583, *3 (W.D.Va.2007)

41. The community caretaker exception applies only where an officer is acting in his or her community caretaker function and only requires a reasonable belief that an emergency exists requiring his or her attention. The reasonable belief standard is less exacting than the probable cause requirement for an officer acting to investigate and uncover crime, which is at the core of his or her duties.

42. **Authority:** Mincey v. Arizona, 437 U.S. 385, 392-93, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); Maryland v. Buie, 494 U.S. 325, 336-37, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

43. The exception requires you to look at the function performed by a police officer. It applies when officers are serving as “community caretakers,” protecting the safety of persons or property

44. **Authority:** Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); United States v. Gillespie, 332 F.Supp.2d 923, 929 (W.D.Va.2004); United States v. Davis, 2007 WL 2301583, *3 (W.D.Va.2007)

THE KILLING OF THE DOG

45. Courts have consistently recognized that a law enforcement officer's killing of a dog constitutes a destruction of the owner's property and therefore a seizure under the Fourth Amendment. However, the government retains a strong interest in allowing law enforcement officers to protect themselves and the citizenry from animal attacks. Thus, no unreasonable seizure will be found where an officer has killed a dog that posed an imminent threat. Where the dog is displaying aggressive or threatening behavior toward an officer, such behavior can be deemed an imminent threat. Also a dog approaching an officer quickly and coming within close proximity to the officer while exhibiting threatening behavior can constitute an imminent threat justifying the killing of the dog.

46. **Authority:** San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 975 (9th Cir.2005); Altman v. City of High Point, 330 F.3d 194, 205 (4th Cir.2003); Hatch v. Grosinger, 2003 WL 1610778 (D.Minn.2003); Warboys v. Officer Proulx, 303 F.Supp.2d 111, 118 (D.Conn.2004).

QUALIFIED IMMUNITY

47. I have now completed my instructions to you on the elements of plaintiff's Section 1983 claim. If you find that the plaintiff has proven the elements of his Section 1983 claim against a defendant, you must proceed to consider whether the defendant is entitled to what the law calls "qualified immunity" for each claim that the plaintiff has proved.

48. A particular defendant will be entitled to qualified immunity if, at the time of the conduct complained of, he should have known that his conduct was contrary to clearly established federal law.

49. The defendant whom you are considering has the burden of demonstrating that his conduct did not violate the clearly established federal law about which I have instructed you. A particular defendant is entitled to qualified immunity only if a reasonable police officer in defendant's position would not have been expected at the time to know that his conduct violated clearly established federal law.

50. In deciding what a reasonable officer should have known about the legality of his conduct, you may consider the nature of that defendant's official responsibilities, the information that was known to the defendant or not known to him at the time of the incident in question, and the events that confront him.

51. Qualified immunity is an affirmative defense. Having claimed insulation from liability on the basis of qualified immunity, it is defendants' burden of proving the elements of that defense by a preponderance of the evidence. The elements required to be proven are: One, that their conduct was within the scope of their duties; two, that their conduct was not violative of constitutional rights clearly established at the time of

their conduct. A defendant is entitled to the absolute defense if, in the performance of his duties, as would a reasonably objective police officer, he had an objectively reasonable belief that there was probable cause that plaintiff committed the offense charged.

52. **Authority:** Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir.2004); Boyd v. New York, 336 F.3d 72, 76 (2d Cir.2003); Pearson v. Callahan, 129 S.Ct. 808, 815 (2009) *citing* Groh v. Ramirez, 540 U.S. 551, 567 (2004); Butz v. Economou, 438 U.S. 478, 507 (1978).

53. Thus, you must ask yourself what a reasonable officer in the particular defendant's situation would believe about the legality of his conduct. If you find that a reasonable officer in the defendant's situation would have believed that his conduct was lawful, the official is protected from liability by qualified immunity.

54. To summarize, if the defendant whom you are considering convinces you by a preponderance of the evidence that his conduct did not violate clearly established federal law on a particular claim, then you must return a verdict for that defendant on that claim. This is so even though you may have previously found that the defendant in fact violated the plaintiff's federally protected rights. If you find that the defendant has not proved that he is entitled to qualified immunity on a particular claim, then you should proceed to consider the issue of damages.

55. **Authority:** 42 U.S.C 1983; Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 77 USLW 4068 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Saucier v. Katz, 533 U.S. 194, 200-01 (2001); Lennon v. Miller, 66 F.3d 416, 422 (2d Cir. 1995); Anderson v. Creighton, 483 U.S. 635, 641 (1987); Anderson v. Branen, 17 F.3d 552,

557 (2d Cir. 1994); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982); Graham v. Connor, 490 U.S. 386, 394, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989); Conn. Gen. Stat. 53a-23.

56. Therefore, you must determine if it was objectively reasonable for the officers to believe that the area of plaintiffs' yard they entered was not "curtilage" and their entry was not a Fourth Amendment search. If you determine that the area of the yard the officers entered was curtilage, you must then determine if it was objectively reasonable for the officers to believe that there were exigent circumstances that justified their entry into the yard and/or the officers were acting in their capacity as a common caretaker. You must also determine if it was objectively reasonable for O'Hare to believe that the dog posed an imminent threat.

SUBSTANTIVE DUE PROCESS

57. The Due Process Clause of the Fourteenth Amendment maintains that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause guarantees more than fair process; it covers a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them. Substantive due process, the most general of the Due Process protections, is often identified within the context of protecting certain fundamental rights (e.g., bodily integrity, marriage, procreation), or protecting individuals from other arbitrary government behavior so brutal and so offensive to human dignity that it "shocks the conscience of the court.

58. However, not all wrongs perpetrated by a government actor violate due process. In order to prevail on a substantive due process claim, the plaintiff must first

establish the existence of a federally protectable property right, which requires a demonstration of a clear entitlement to a benefit under state law. Substantive due process has been held to protect against only the most arbitrary and conscience shocking governmental intrusions into the personal realm that our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. Thus, substantive due process has been held to safeguard such intimate activities as marriage; contraception; education of children; and bodily integrity.

59. Second, a plaintiff must also demonstrate that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. A plaintiff must show not just that the action was literally arbitrary, but that it was arbitrary in the constitutional sense. Mere irrationality is not enough: only the most egregious official conduct, conduct that shocks the conscience, will subject the government to liability for a substantive due process violation based on executive action.

60. The protections of substantive due process are available only against egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience. The test of what shocks the conscience is not precise and it also varies depending on the factual context. Malicious and sadistic abuses of power by government officials, intended to oppress or to cause

injury and designed for no legitimate government purpose, unquestionably shock the conscience. On the other hand, overzealous or erroneous government action alone does not give rise to a constitutional violation.

61. In one Connecticut case, the court found that a police officer's shooting and killing of dog owner's pitbull, which escaped from residence and ran towards the officer, was reasonable conduct that did not shock the conscience. It was determined that the officer's conduct was objectively reasonable because the pitbull weighed between 90 and 100 pounds, traveled distance of approximately 30 feet in five seconds, and would have reached officer in one and one-half seconds or less.

62. **Authority:** County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998); Albright v. Oliver, 510 U.S. 266, 272 (1994); Rochin v. California, 342 U.S. 165, 172, 174 (1952); Smith ex rel. Smith v. Half Hollow Hills Cent. School Dist., 298 F.3d 168, 173 (2d Cir.2002); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965); Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923); ATC Partnership v. Windham, 251 Conn. at 597, 606 (1999); Benzman v. Whitman, 523 F.3d 119, 126 (2d Cir.2008); Velez v. Levy, 401 F.3d 75, 93 (2d Cir.2005); United States v. Salerno, 481 U.S. 739, 746 (1987); O'Connor v. Pierson, 426 F.3d 187, 203 (2d Cir.2005); Smith v. Half Hollow Hills Central School, 298 F.3d 168, 173 (2d Cir.2002); Arnone v. Connecticut Light & Power Co., 90 Conn.App. 188, 201-03 (2005); Eichenlaub v. Township of Indiana, 385 F.3d 274, 285 (3d Cir.2004), *cert. denied* 128 S.Ct. 201 (2007); Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 252 (2d Cir.2001); Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 145 (2d Cir.1994); Warboys v. Proulx, 303 F.Supp.2d 111 (D.Conn.,2004).

QUALIFIED IMMUNITY

63. You must also determine if the officers are entitled to qualified immunity on the plaintiffs' substantive due process claim. You must determine if it was objectively reasonable for an officer in O'Hare's position to believe that his actions were not violative of due process. You must determine if it was objectively reasonable for an officer in O'Hare's position to believe that his actions were not so egregious, so outrageous, that they shocked the contemporary conscience.

64. **Authority:** 42 U.S.C 1983; Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 77 USLW 4068 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Saucier v. Katz, 533 U.S. 194, 200-01 (2001); Lennon v. Miller, 66 F.3d 416, 422 (2d Cir. 1995); Anderson v. Creighton, 483 U.S. 635, 641 (1987); Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982); Graham v. Connor, 490 U.S. 386, 394, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989); Conn. Gen. Stat. 53a-23.

FAILURE TO INTERVENE

65. The complaint alleges that Pia failed to prevent O'Hare from unlawfully shooting the plaintiff's dog. Now, if you have already concluded that the entry into the killing of the dog was justified, you need not consider whether Pia had a duty to intervene.

66. An officer may be legally responsible if, while in a position to intervene but failed to do so. However, an officer cannot be held liable for failure to intercede unless such failure permitted fellow officers to violate the plaintiff's clearly established rights, and unless the failure to intercede occurred in circumstances in which it was objectively

unreasonable for him to believe that his fellow officers' conduct did not violate those rights. Objectively unreasonable means that all reasonable officers, in the position of the defendants, would have to intervene. Put another way, objectively unreasonable means no reasonable officer could believe the conduct was lawful. If you conclude that reasonable officers could disagree whether the officers' conduct was appropriate, you must find for the defendants on this issue.

67. To say it another way, you may only find that the defendants failed to intervene if they knew or should have know that the entry into the property and killing of the dog was not justified, **and**, that each defendant had a reasonable opportunity to intervene under the circumstances then and there existing. If you conclude that reasonable officers could disagree about whether the entry into the property and killing of the dog was justified or reasonable officers could disagree about whether or not they could have intervened, you must find for the defendants. In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring

68. **Authority:** Ricciuti v. N.Y. City Transit Auth., 124 F.3d 123, 129 (2d Cir.1997); O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir.1988); Anderson v. Branen, 17 F.3d 552, 557 (2d Cir.1992).

69. Therefore, you must determine if a reasonable person in Pia's position would not have known that the plaintiffs' constitutional rights were being violated. Also, you must determine if Pia had a realistic opportunity to intervene.

THE CONNECTICUT CONSTITUTION CLAIM

70. Since the plaintiffs have adequate alternative remedies based upon existing claims under both the Fourth and Fourteenth Amendments to the United States Constitution, a cause of action cannot be inferred to exist under the Connecticut Constitution. Therefore, this is no viable cause of action in this case pursuant to the Connecticut Constitution.

71. **Authority:** Binette v. Sabo, 244 Conn. 23 (1998); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314, 334-38 (1993); ATC Partnership v. Windham, 251 Conn. 597, 613-14 (1999).

THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

72. The plaintiffs have also pled a claim for intentional infliction of emotional distress. In order to recover damages on a claim for intentional infliction of emotional distress it must be shown: (1) that the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress and (4) that the emotional distress sustained by the plaintiff was severe.

73. Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the

recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" Conduct that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

74. Extreme and outrageous conduct is conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. The standard in Connecticut to demonstrate extreme and outrageous conduct is stringent. Mere insults, indignities, or annoyances that are not extreme and outrageous will not suffice. The Defendants' conduct cannot be merely rude, tactless or insulting. Conduct that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress.

75. However, Connecticut does not allow recovery for intentional or negligent infliction of emotional distress resulting from an injury solely to property. Connecticut law never recognized a right to sue an individual for intentional or negligent infliction of emotional distress resulting from injury to such property as a pet. There is no law in Connecticut that allows plaintiffs to recover noneconomic damages resulting from a defendant's alleged negligent or intentional act resulting in the death of a pet.

76. **Authority:** Petyan v. Ellis, 200 Conn. 243, 253 (1986); Carrol v. Allstate Ins. Co., 262 Conn. 433, 442-43 (2003); Appleton v. Board of Education, 254 Conn. 205, 210-11 (2000); Bell v. Board of Education, 55 Conn.App. 400, 410 (1999); Tracy v. New Milford Public Schools, 101 Conn.App. 560, 569, *cert. denied*, 284 Conn. 910 (2007); DeLaurentis v. New Haven, 220 Conn. 225, 267 (1991); W. Prosser & W.

Keeton, Torts (5th Ed.1984), §12, p. 60; Ancona v. Manafort Bros., Inc., 56 Conn.App. 701, 712 (2000); Russo v. City of Hartford, 184 F.Supp.2d 169, 188 (D.Conn.2002); Brown v. Ellis, 40 Conn.Supp. 165, 167 (Conn.Super.Ct.1984); Garris v. Dep't of Corr., 170 F.Supp.2d 182, 189 (D.Conn.2001); Daniels v. City of New Haven, 2008 WL 5481703, Superior Court of Connecticut, CV-01-0451523-S (December 03, 2008, Cronan, J.); Delco v. Reed, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 99 0172435 (January 3, 2000, Hickey, J.); Myers v. Hartford, 84 Conn.App. 395, 402, *cert. denied*, 271 Conn. 927 (2004); Bose v. Lewis, Superior Court of Connecticut, Judicial District of New London No. 4101451 (Dec. 14, 2005, Devine, J.); Coston v. Reardon, Superior Court of Connecticut, No. 063892 (Oct. 18, 2001).

THE TRESPASS CLAIM

77. The complaint alleges that the defendants O'Hare and Pia unlawfully entered upon the plaintiff's fenced yard without privilege to do so and their actions constituted a trespass under Connecticut law.

78. Under Connecticut common law, the essentials of an action for trespass are: (1) ownership or possessory interest in land by the plaintiff; (2) invasion, intrusion or entry by the defendant affecting the plaintiff's exclusive possessory interest; (3) done intentionally; and (4) causing direct injury. However, a policeman who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee. In fact, if the conditions for the exercise of a public duty exist, the occupier would not be privileged to exclude the officer. It has long been held that a

police officer who makes such an entry onto private property, in the course of performing his official duties, is not a trespasser but a licensee.

79. **Authority:** City of Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 87 (2007); 38 Am.Jur., Negligence, s 124; 2 Harper & James, Torts s 27.14 n. 21; U.S. v. St. Clair, 240 F.Supp. 338 (D.C.N.Y. 1965); Roberts v. Rosenblatt, 146 Conn. 110 (1959); Haffey v. Lemieux, 154 Conn. 185 (1966); Wroniak v. Ayala, Superior Court, judicial district of Hartford, Docket No. 94 0544499 (June 13, 1995, Sheldon, J.); Furstein v. Hill, 218 Conn. 610, 615 (1991); State v. Plummer, 241 A.2d 198 (1967); State of Connecticut v. Alexander, Superior Court of Connecticut, Judicial District of Fairfield. No. CR060215063 (June 3, 2008, Hauser, J.)

THE CONVERSION CLAIM

80. The complaint alleges that the defendant O'Hare's unjustified and willful interference with the rights of the plaintiff and his minor daughter by killing the dog deprived the plaintiff of his property, a beloved family pet, resulting in damages - conversion.

81. To establish a claim for conversion, a plaintiff must show that: (1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property before its conversion; and (3) defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights. The tort of conversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights. In addition, conversion requires that the owner be harmed as a result of the unauthorized act.

82. However, a conversion occurs only if the officers' actions were unauthorized. If you find that the dog posed an imminent threat to the officers, the officers were authorized to kill the dog. So if you find that the dog posed an imminent threat to the officers, thereby authorizing them to kill the dog, there can be no claim for conversion.

83. **Authority:** Noses v. Martin, 360 F.Supp.2d 533, 541 (S.D.N.Y.2004); News America Marketing In-Store, Inc. v. Marquis, 86 Conn.App. 527, 544 (2004), *cert. granted*, 273 Conn. 905 (2005); Suarez-Negrette v. Trotta, 47 Conn.App. 517, 521 (1998).

THE NEGLIGENCE CLAIM

84. The complaint alleges that O'Hare and Pia were negligent in entering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property. The plaintiff's complaint alleges that the defendants were negligent in that they should have been aware of a substantial and unjustifiable risk that their conduct would violate plaintiff's rights.

GOVERNMENTAL IMMUNITY

85. Under Connecticut common law, both municipalities and municipal employees are provided with immunity from liability for their arguably negligent acts. Therefore, we must first determine if the defendants are entitled to immunity for the acts alleged by the plaintiff.

86. The first issue to resolve is whether the defendants were engaged in governmental acts. Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. I charge you that the defendants were engaged in acts that were performed wholly for the direct benefit of the public and therefore were governmental acts.

87. **Authority:** Gauvin v. New Haven, 187 Conn. 180, 184 (1982); Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 167-68 (1988); Heigl v. Board of Education, 218 Conn. 1, 5 (1991); Violano v. Fernandez, 280 Conn. 310, 318 (2006); Cotto v. Board of Education, 294 Conn. 265, 272 n. 8 (2009); Williams v. City of New Haven, 243 Conn. 763, 766 (1998); Heigl v. Bd. of Ed., 218 Conn. 1, 4 (1991); Ryszkiewicz v. New Britain, 193 Conn. 589, 593 (1994); Williams v. City of New Haven, 243 Conn. 763, 766-67 (1998); Conn. Gen. Stat §52-557n.

88. The next issue to resolve is whether the alleged acts of negligence were discretionary acts. A municipality or municipal employee will not be liable for damages to person or property caused by their negligent acts or omissions which require the exercise of judgment or discretion, but might be liable for negligent acts that are ministerial in nature. Generally, a municipality or municipal employee is liable for the misperformance of ministerial acts, but has immunity in the performance of discretionary or governmental acts.

89. The difference between discretionary or governmental acts and ministerial acts is easily discernable. Municipalities and municipal employees enjoy governmental immunity from liability for the performance of governmental acts as distinguished from ministerial acts. Governmental acts are defined as those, which are supervisory or

discretionary in nature. A ministerial act is one, which is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action. The hallmark of a discretionary act is that it requires the exercise of judgment. In contrast, ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. Discretionary act immunity reflects a value judgment that despite injury to a member of the public the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. In contrast, municipalities and municipal employees are not immune from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion.

90. **Authority:** Violano v. Fernandez, 280 Conn. 310, 318 (2006); Heigl v. Bd. of Ed., 218 Conn. 1, 4-5 (1991); Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 167 (1988); Doe v. Petersen, 279 Conn. 607, 614 (2006).

91. Therefore, the question becomes, were the acts of negligence alleged by the plaintiff discretionary acts or ministerial acts? I charge you that the investigation of crimes and the decisions to make arrests are discretionary rather than ministerial functions.

92. **Authority:** Escobales v. New Britain, Superior Court, judicial district of New Britain, Docket No. CV 06 4009470 (May 5, 2006, Shapiro, J.) (41 Conn. L. Rptr. 351), *quoting* Skrobacz v. Sweeney, 49 Conn. Supp. 15, 32 (2003); *see also* Mikita v. Barre, Superior Court, judicial district of New Haven, Docket No. CV 99 0430564 (May

22, 2001, Munro, J.); Peters v. Greenwich, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 95 0147192 (January 2, 2001, D'Andrea, J.) (28 Conn. L. Rptr. 671, 674); Elinsky v. Marlene, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV 96 0557659 (October 31, 1997, Hale, J.T.R.); Gonzalez v. Bridgeport, Superior Court, judicial district of Fairfield, Docket No. CV 88 253464 (June 4, 1993, Fuller J.); Galindez v. Miller, 285 F.Supp.2d 190, 195 (D.Conn.2003).

93. However, discretionary acts can be transformed into ministerial acts if there they are performed in accordance with a set policy or procedure. When a municipal employee acts pursuant to any city charter provision, ordinance, regulation, rule, policy or any other directive, then courts have held that the employee was engaging in a ministerial function. Therefore, when a municipal employee acts pursuant to any city charter provision, ordinance, regulation, rule, policy or any other directive, otherwise discretionary acts will then be transformed into ministerial acts.

94. I charge you that there is no Town of East Hartford charter provision, ordinance, regulation, rule, policy or any other directive that deals with the investigation of crimes and the decision to make arrests. Therefore, since the acts of the investigation of crimes and the decision to make arrests are discretionary acts, and there is no city charter provision, ordinance, regulation, rule, policy or any other directive that deals with these acts, I charge you that the defendants are entitled to governmental immunity for these alleged acts of negligence.

95. **Authority:** Violano v. Fernandez, 280 Conn. 310 (2006); Kolaniak v. Board of Education, 28 Conn.App. 277 (1992).

96. The next issue to address is whether there was an exception to the defendants' governmental immunity defense. There are three exceptions to governmental immunity. Each of these exceptions represents a situation in which the public official's duty to act is so clear and unequivocal that the policy rationale underlying discretionary act immunity-to encourage municipal officers to exercise judgment-has no force. First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. Of the three, only the identifiable person-imminent harm exception is applicable in this case.

97. The identifiable person-imminent harm exception requires the plaintiff to prove three elements: (1) an identifiable victim; (2) an imminent harm and; (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. All three of these factors are intimately tied to the question of foreseeability, and all must be met for a plaintiff to overcome governmental immunity. Failure to establish any one of the three prongs will be fatal to a plaintiff's claim that he comes within this exception.

98. To satisfy the first element of the exception, the plaintiffs must show that they were identifiable victims. They must do so by proving that they were a part of a narrowly defined class of foreseeable victims. The only narrowly defined class of

foreseeable victims are schoolchildren who are statutorily compelled to attend school, during school hours on school days.

99. To satisfy the second element of the exception, the plaintiffs must show that they were subjected to imminent harm. Only after a decision is reached as to whether a plaintiff is either an identifiable person, do we then address whether or not the plaintiff was also subject to imminent harm. Imminent is defined as something about to materialize of a dangerous nature. Imminent harm excludes risks, which might occur, if at all, at some unspecified time in the future. In order to meet the imminent harm element of this exception the risk must be temporary and of short duration. Imminent harm has been defined as harm ready to take place within the immediate future. The alleged imminent harm must be imminent in terms of its impact on a specific identifiable person. Imminent requires a foreseeable event at a discrete place and time period at which the harm will occur.

100. In addition to a limited time period and limited geographic area, an imminent harm must involve a potential for harm that is significant and foreseeable. The logic of this exception is that municipal officers only have a duty to a foreseeable victim to protect against dangers that may be anticipated. On the other hand, where a danger can occur at any time in the future or not at all, there is no imminence. The imminent harm aspect of this exception is very restrictive and applies only to risks that are temporary and confined in space. Imminent harm excludes perils that might occur, if at all, at some unspecified time in the future. We must distinguish between negligent conduct, which creates foreseeable and even continual exposure to harm at some unknown future time and place, and imminent harm.

101. Therefore, the plaintiffs must prove that the alleged harm was limited to this specific location, at this specific time and was foreseeable. If they cannot establish all three – location, duration, foreseeability – then they cannot establish that they were subjected to imminent harm, and accordingly, the identifiable person-imminent harm exception does not apply and the defendants are entitled to governmental immunity. On the other hand, if they do establish all three – location, duration, foreseeability – then they must next establish the third and final element of the exception – apparentness.

102. To satisfy the final element of the exception, the plaintiffs must prove that there was a public official to whom it was apparent that his or her conduct was likely to subject the plaintiffs to the harm. The apparentness requirement is grounded in the policy goal underlying all discretionary act immunity, that is, keeping public officials unafraid to exercise judgment. It surely would ill serve this goal to expose a public official to liability for his or her failure to respond adequately to a harm that was not apparent to him or her.

103. Therefore, the plaintiffs must prove that the alleged harm was apparent to each of the defendants. If they fail to do so, then they cannot establish that the harm was apparent to the defendants, and accordingly, the identifiable person-imminent harm exception does not apply and the defendants are entitled to governmental immunity.

104. If you find that at the time the officers entered the plaintiffs property, they were acting within their discretion, and it was not apparent to them that they would encounter a dog that would charge at them necessitating the killing of the dog and resulting in emotional distress to the minor plaintiff, then the plaintiff cannot establish the

identifiable person-imminent harm exception, and the officers are entitled to governmental immunity.

105. **Authority:** Purzycki v. Fairfield, 244 Conn. 101, 108 (1998); Doe v. Board of Education, 76 Conn.App. 296, 302-03 (2003); Durrant v. Board of Education, 284 Conn. 91, 107 (2007); Colon v. New Haven, 60 Conn. App. 178 (2000); Cady v. Tolland, Superior Court, judicial district of Tolland, 2006 WL 3691736, Docket No. CV 05 5000054 (November 30, 2006, Peck, J.); Tryon v. North Branford, 58 Conn.App. 702, 712 (2000); Bonington v. Town of Westport, 297 Conn. 297 (2010); Purzycki v. Fairfield, 244 Conn. 101, 110 (1998); Burns v. Board of Education, 228 Conn. 640, 650 (1994); Evon v. Andrews, 211 Conn. 508 (1989); Bruno v. BBC Corp., Superior Court, judicial district of Ansonia-Milford at Derby, 2002 WL 1369917, Docket No. CV 00 00716343 (May 22, 2002, Lager, J.); Beaudette v. Amston Lake Tax Dist., Superior Court, judicial district of Tolland, 2008 WL 4853084, 07-5001240 (Oct. 20, 2008); Violano v. Fernandez, 280 Conn. 310, 319-20 (2006); Fleming v. Bridgeport, 284 Conn. 502, 533 (2007); Cotto v. Board of Education, 294 Conn. 265 (2009).

NEGLIGENCE ELEMENTS

106. The plaintiffs have claimed that the defendants' negligence caused their injuries. The complaint alleges that O'Hare and Pia were negligent in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

107. Negligence is the violation of a legal duty which one person owes to another to care for the safety of that person or that person's property. There are, for

purposes of this case, two kinds of negligence: statutory negligence and common-law negligence. Statutory negligence is the failure to conform one's conduct to a duty imposed by the legislature through the enactment of a statute. Common-law negligence is a violation of the duty to use reasonable care under the circumstances. A violation of either of these duties is negligence. Common-law negligence is the failure to use reasonable care under the circumstances. Reasonable care is the care that a reasonably prudent person would use in the same circumstances.

108. In determining the care that a reasonably prudent person would use in the same circumstances, you should consider all of the circumstances which were known or should have been known to the defendants at the time of the conduct in question. Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised.

109. To establish his claim of negligence the plaintiffs must prove four elements: duty; breach of that duty; causation; and actual injury. If a plaintiff cannot prove all of those elements, the cause of action fails.

110. **Authority:** Sharkey v. Skilton, 83 Conn. 503, 508 (1910); Guglielmo v. Klausner Supply Co., 158 Conn. 308, 318 (1969); Hoelter v. Mohawk Services, Inc., 170 Conn. 495, 501 (1976); Angiolillo v. Buckmiller, 102 Conn.App. 697, 711, *cert. denied*, 284 Conn. 927 (2007); Jagger v. Mohawk Mountain Ski Area, Inc., 269 Conn. 672, 687 n. 13 (2004); D'Angelo Development & Construction Corp. v. Cordovano, 121 Conn.App. 165, 184 (2010); Galligan v. Blais, 170 Conn. 73, 77 (1976); Pleasure Beach

Park Co. v. Bridgeport Dredge & Dock Co., 116 Conn. 496, 503 (1933); Geoghegan v. G. Fox & Co., 104 Conn. 129, 134 (1926).

DUTY

111. A duty to use care exists when a reasonable person, knowing what the defendants here either knew or should have known at the time of the challenged conduct, would foresee that harm of the same general nature as that which occurred here was likely to result from that conduct. If harm of the same general nature as that which occurred here was foreseeable, it does not matter if the manner in which the harm that actually occurred was unusual, bizarre or unforeseeable.

112. In describing the duties involved in this case, I have used the term "reasonable care." Reasonable care is defined as the care which an ordinarily prudent or careful person would use in view of the surrounding circumstances. You must determine the question by placing an ordinarily prudent person in the situation of the defendant and ask yourselves: what would such a person have done? Note that it is the care that such a person would have used under the surrounding circumstances, that is, in view of the facts known or the facts of which the party should have been aware at the time. The standard of care required, that of an ordinarily prudent person under the circumstances, never varies, but the degree or amount of care may vary with those circumstances. For example, in circumstances of slight risk or danger, a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of greater risk or danger, a correspondingly greater amount of care would be required to constitute reasonable care.

113. **Authority:** Coburn v. Lenox Homes, Inc., 186 Conn. 370, 375 (1982); Pisel v. Stamford Hospital, 180 Conn. 314, 332-33 (1980); Orlo v. Connecticut Co., 128 Conn. 231, 237 (1941).

BREACH OF DUTY

114. Next, it is the plaintiffs' burden to prove that the defendants breached the duty of care owed to him.

CAUSATION

115. Next, the plaintiffs must prove that the defendants' breach of duty was the cause of his injuries. In order to prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries, that is, that the conduct both caused the injury in fact and proximately caused the injury. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. The test of proximate cause is whether the defendant's conduct is a substantial factor in producing the plaintiff's injury.

116. If you find that the defendants were negligent in any of the ways alleged in the plaintiffs' complaint, you must next decide if such negligence was a legal cause of any of the plaintiff's claimed injuries. Legal cause has two components: cause in fact and proximate cause. Negligence is a proximate cause of an injury if it was a substantial factor in bringing the injury about. More specifically, negligence is a substantial factor in bringing about an injury if it contributes materially to the production of the injury. Negligence contributes materially to the production of an injury if its causative effects remain in active operation until the moment of injury, or at least until the setting in motion of the final active injurious force which immediately produces or

precedes the injury. By this definition, negligence which makes only a remote, a trivial or an inconsequential contribution to the production of an injury is not a substantial factor in bringing about the injury, and thus is not a proximate cause of the injury.

117. The evidence of causation must be sufficiently clear so that you as jurors could so find without resorting to speculation or conjecture. If you find that the plaintiffs have failed to prove that defendants' conduct was both a cause in fact and a substantial factor in causing their damages, then you must return a verdict in favor of the defendants.

118. **Authority:** Craig v. Driscoll, 262 Conn. 312, 330 (2003). Lodge v. Arett Sales Corp., 246 Conn. 563, 574 (1998); Doe v. Manheimer, 212 Conn. 748, 757-58 (1989); Ferndale Dairy, Inc. v. Geiger, 167 Conn. 533, 538 (1975); Paige v. St. Andrew's Roman Catholic Church Corp., 250 Conn. 14, 25-26 (1999).

SPECIAL DEFENSES TO NEGLIGENCE CLAIMS

119. In this case the defendants have filed special defenses alleging that the plaintiffs injuries were legally caused by his own negligence. The defendants must prove the elements of this special defense by a preponderance of the evidence. Specifically, the defendants must prove that the plaintiffs were negligent in one or more of the ways specified in the special defense and that such negligence was a legal cause of any of the plaintiff's injuries.

CONTRIBUTORY NEGLIGENCE

120. The special defenses filed by the defendants allege a number of specific ways in which the plaintiff was negligent. To prove negligence, it is not necessary for the defendants to prove that the plaintiff was negligent in all of the ways claimed. Proof

that the plaintiff was negligent in just one of the ways claimed is sufficient to prove negligence.

121. The defendants claim that the plaintiffs were negligent in that they: (a) failed to act as a reasonable prudent person; (b) failed to obey the lawful command of police officers; (c) failed to control their dog and keep it from attempting to attack an officer; (d) created the situation where the dog put a police officer at imminent risk of serious physical injury; (e) failed to maintain fencing around their home; and (f) failed to provide adequate warnings of potential harm that might result from entering plaintiffs' property.

122. The defendants have raised a special defense that the plaintiff failed to act as a reasonable and prudent person. That means that the plaintiff was not acting as a reasonably prudent or careful person would have acted in view of the circumstances that you find existed at the time. If you find that the defendants have proved that the plaintiff was not using reasonable care as he ought to have, then the defendants have proved the defense of contributory negligence and you must consider this negligence of the plaintiff in relation to that of the defendants.

123. **Authority:** General Statutes § 52-114; Sitnik v. National Propane Corp., 151 Conn. 62, 65 (1963); Olshefski v. Stenner, 26 Conn. App. 220, 222-25 (1991).

124. I have previously instructed you that the defendants are under the obligation to exercise the care which a reasonably prudent person would use under the circumstances. The plaintiffs are under the same obligation. A plaintiff is negligent if the plaintiff does something which a reasonably prudent person would not have done

under similar circumstances or fails to do that which a reasonably prudent person would have done under similar circumstances.

125. As I have explained, the plaintiff has claimed that the incident was caused by the defendants' negligence, and the defendants have claimed that it was caused by the plaintiffs' own negligence. If you find that negligence on the part of BOTH parties was a substantial factor in causing the incident, then the law is that the plaintiff can recover damages from the defendants only to the extent of the defendants' fault and may not recover damages to the extent that he himself was at fault. If the plaintiffs were more at fault than the defendants, then the plaintiffs cannot recover any damages.

126. Here is an example to make this rule clear: If the plaintiff was 20% at fault and the defendants were 80% at fault, the plaintiff recovers 80% of her damages. If the plaintiff was 50% at fault and the defendants were 50% at fault, the plaintiff recovers 50% of her damages. However, if the plaintiff was more than 50% at fault, he was more at fault than the party he has sued, and he recovers no damages. Just as an example, suppose the plaintiff's total damages were \$100. If the plaintiff was 30% at fault and the defendants were 70% at fault, the plaintiff would recover 70% of the \$100, or \$70. The plaintiff would thus not receive payment for the part of his damages caused by his own negligence.

127. In making this comparison, the number of acts of negligence is not controlling. A party negligent in one respect may be just as negligent as one found negligent in two or more ways. The reverse may also be true. The fact that acts of negligence are of the same kind and character is not conclusive. Two parties may exceed speed laws, for example, in ways that differ widely in manner and degree. In

determining the comparative negligence of each party you should consider the totality of the acts and conduct on each side and the degree to which each contributed to the occurrence and thus arrive at a fair and just determination how the award is to be apportioned.

128. **Authority:** Wright & Daly, Connecticut Jury Instructions, §193.

MITIGATION OF DAMAGES

129. In this case the defendants have filed a special defense alleging that the plaintiffs failed to mitigate their damages. As indicated, the defendants must prove the elements of this special defense by a preponderance of the evidence.

130. The doctrine of mitigation of damages contemplates that one who has been injured by the negligence of another must use reasonable care to promote recovery and prevent any aggravation or increase of the injuries. To claim successfully that the plaintiff failed to mitigate damages, the defendant must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty. An assessment of whether a person has done what a reasonably prudent person would be expected to do under the same circumstances falls under the duty to mitigate damages. The theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to promote recovery and avoid aggravating the original injury.

131. **Authority:** Hallas v. Boehmke & Dobosz, Inc., 239 Conn. 658, 668-69 (1997); Stevenson v. Kettler International, Inc., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 05 5000357 (August 14, 2006, Lewis, J.T.R.) (42 Conn. L. Rptr. 69).

USE OF PHYSICAL FORCE IN DEFENSE OF PERSON

132. A person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose. Deadly physical force may be used if the person reasonably believes that such other person is using or about to use deadly physical force, or inflicting or about to inflict great bodily harm. A person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety by retreating. However, a police officer is not required to retreat.

133. **Authority:** C.G.S. §53a-19

THE RECKLESSNESS CLAIM

134. The plaintiffs have also alleged that the officers were reckless. The complaint alleges that O'Hare and Pia were reckless in encountering the plaintiff's property without lawful authority, thereby placing themselves in a situation that caused the plaintiff's dog to react and bark, resulting in the aforementioned harm to the plaintiffs.

135. Recklessness is a state of consciousness with reference to the consequences of one's acts. It is more than negligence, more than gross negligence.

The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Wanton misconduct is reckless misconduct. It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. Willful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.

136. **Authority:** Craig v. Driscoll, 262 Conn. 312, 342 (2003).

USE OF PHYSICAL FORCE IN DEFENSE OF PERSON

137. A person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose. Deadly physical force may be used if the person reasonably believes that such other person is using or about to use deadly physical force, or inflicting or about to inflict great bodily harm. A person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety by retreating. However, a police officer is not required to retreat.

138. **Authority:** C.G.S. §53a-19

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on May 4, 2012, a copy of the foregoing Amended Proposed Jury Instructions was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

AMENDED EXHIBIT I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	MAY 4, 2012

DEFENDANTS' AMENDED PROPOSED JURY INTERROGATORIES

I. FOURTH AMENDMENT - ENTRY INTO PROPERTY

- A. Have the plaintiffs proved, by a preponderance of the evidence, that they had a reasonable expectation of privacy in area of their yard the officers entered, thereby making it curtilage?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Fourth Amendment claim of illegal entry onto their property, so now proceed to Section VII. If your answer is "YES," proceed Section II.]

II. FOURTH AMENDMENT – ENTRY INTO PROPERTY - QUALIFIED IMMUNITY

- A. Do you find that the area of the plaintiffs property the officers entered was not fully enclosed by a fencing or some other barrier?

_____ Yes

_____ No

- B. Do you find that the plaintiffs did not take steps to protect the area of their property the officers entered from view?

_____ Yes

_____ No

- C. Do you find that the area of the plaintiffs property the officers entered did not harbor the intimate activities associated with the sanctity of a man's home and the privacies of life?

_____ Yes

_____ No

- D. Do you find that the area of the plaintiffs property the officers entered was visible from the street?

_____ Yes

_____ No

- E. Do you find that the area of the plaintiffs property the officers entered was open to or used by visitors?

_____ Yes

_____ No

- F. Do you find that the officers entered the plaintiffs property through an open gate in an urban neighborhood?

_____ Yes

_____ No

- G. Do you find that the plaintiffs property was surrounded by fencing that served only as a physical barrier and did not in any way restrict the line of sight between the plaintiffs yard and that of their neighbor's?

_____ Yes

_____ No

- H. Do you find that the rear area of the plaintiffs property was freely observable to the public and/or neighbors?

_____ Yes

_____ No

- I. Do you find that the plaintiffs property and their neighbors' property had side yards that were narrow and contiguous to each other?

_____ Yes

_____ No

[Proceed Section III.]

III. FOURTH AMENDMENT – EXIGENT CIRCUMSTANCES EXCEPTION

- A. Do you find that the officers had exigent circumstances that justified their entry onto the plaintiff's property?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Fourth Amendment claim of illegal entry onto their property, so now proceed to Section VII. If your answer is "NO," proceed Section IV.]

IV. FOURTH AMENDMENT – EXIGENT CIRCUMSTANCES EXCEPTION – QUALIFIED IMMUNITY

- A. Do you find that an Officers' desire to find illegal guns and get them off the street is a compelling interest?

_____ Yes

_____ No

- B. Do you find that an Officers' desire to stop an illegal gun transaction from taking place is a compelling interest?

_____ Yes

_____ No

- C. Do you find that an Officer learning of illegal guns stashed in an abandoned car would lead them to reasonably believe that there was an urgent need to take action?

_____ Yes

_____ No

- D. Do you find that an Officer learning of an illegal gun transaction would lead them to reasonably believe that there was an urgent need to take action??

_____ Yes

_____ No

[Proceed Section V.]

V. FOURTH AMENDMENT – COMMON CARETAKER EXCPETION

- A. Do you find that the officers were acting in their function as common caretakers when they entered the plaintiff's property?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Fourth Amendment claim of illegal entry onto their property, so now proceed to Section VII. If your answer is "NO," proceed Section VI.]

VI. FOURTH AMENDMENT – COMMON CARETAKER EXCPETION – QUALIFIED IMMUNITY

- A. Do you find that the defendant officers, when they entered the plaintiffs' property, were acting in their capacity of community caretakers and not involved in detection, investigation, or acquisition of evidence relating to the violation of a criminal statute?

_____ Yes

_____ No

- B. Do you find that the defendant officers, when they entered the plaintiffs' property, were taking measures to maintain the peace and quiet of the community?

_____ Yes

_____ No

- C. Do you find that the defendant officers, when they entered the plaintiffs' property, were safeguarding individuals from harm ?

_____ Yes

_____ No

- D. Do you find that the defendant officers, when they entered the plaintiffs' property, had a reasonable belief that a situation existed requiring their attention?

_____ Yes

_____ No

[Proceed Section VII.]

VII. FOURTH AMENDMENT - KILLING OF DOG

- A. Did the plaintiffs' dog pose an imminent threat to the officers?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Fourth Amendment claim for killing their dog, so now proceed to Section IX. If your answer is "NO," proceed Section VIII.]

VIII. FOURTH AMENDMENT - KILLING OF DOG – QUALIFIED IMMUNITY

- A. Do you find that the dog was lunging at the officers?

_____ Yes

_____ No

B. Do you find that the dog was growling at the officers?

_____ Yes

_____ No

C. Do you find that the dog was snapping at the officers?

_____ Yes

_____ No

D. Do you find that the dog was chasing the officers?

_____ Yes

_____ No

E. Do you find that the dog was showing its teeth at the officers?

_____ Yes

_____ No

F. Do you find that the dog was barking in an aggressive manner at the officers?

_____ Yes

_____ No

G. Do you find that the dog was acting aggressive towards the officers?

_____ Yes

_____ No

H. Do you find that O'Hare was unable to outrun the dog?

_____ Yes

_____ No

I. Do you find that O'Hare yelled at the dog in attempt to make it stop?

_____ Yes

_____ No

- J. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare?

_____ Yes

_____ No

- K. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to growl at O'Hare?

_____ Yes

_____ No

- L. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to snap at O'Hare?

_____ Yes

_____ No

- M. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to act aggressive towards O'Hare?

_____ Yes

_____ No

- N. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare, and O'Hare could not outrun the dog?

_____ Yes

_____ No

- M. Do you find that it was reasonable for O'Hare to fear that the dog had the potential to cause serious physical injury to himself or Officer Pia?

_____ Yes

_____ No

[Proceed Section IX.]

IX. DUE PROCESS

- A. Has the plaintiff established that the officers actions were so egregious, so outrageous, that they may fairly be said to shock the contemporary conscience, because they intended to cause the minor plaintiff emotional distress when O'Hare shot the dog?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Due Process claim, so now proceed to Section XI. If your answer is "YES," proceed Section X.]

X. DUE PROCESS – QUALIFIED IMMUNITY

- A. Do you find that the dog was lunging at the officers?

_____ Yes

_____ No

- B. Do you find that the dog was growling at the officers?

_____ Yes

_____ No

- C. Do you find that the dog was snapping at the officers?

_____ Yes

_____ No

- D. Do you find that the dog was chasing the officers?

_____ Yes

_____ No

E. Do you find that the dog was showing its teeth at the officers?

_____ Yes

_____ No

F. Do you find that the dog was barking in an aggressive manner at the officers?

_____ Yes

_____ No

G. Do you find that the dog was acting aggressive towards the officers?

_____ Yes

_____ No

H. Do you find that O'Hare was unable to outrun the dog?

_____ Yes

_____ No

I. Do you find that O'Hare yelled at the dog in attempt to make it stop?

_____ Yes

_____ No

J. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare?

_____ Yes

_____ No

K. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to growl at O'Hare?

_____ Yes

_____ No

- L. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to snap at O'Hare?

_____ Yes

_____ No

- M. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to act aggressive towards O'Hare?

_____ Yes

_____ No

- N. Do you find that even after O'Hare yelled at the dog in attempt to make it stop, the dog continued to chase O'Hare, and O'Hare could not outrun the dog?

_____ Yes

_____ No

- M. Do you find that it was reasonable for O'Hare to fear that the dog had the potential to cause serious physical injury to himself or Officer Pia?

_____ Yes

_____ No

[Proceed Section XI.]

XI. FAILURE TO INTERVENE

- A. Do you find that O'Hare was violating the plaintiffs' constitutional rights when he shot and killed their dog?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Failure to Intervene claim, so now

proceed to Section XII. If your answer is "YES," proceed to Question B of this Section.]

- B. Did Pia have a reasonable opportunity to intervene under the circumstances to stop O'Hare from shooting the dog?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Failure to Intervene claim, so now proceed to Section XII. If your answer is "YES," proceed to Section XII.]

XII. EMOTIONAL DISTRESS

- A. Have the plaintiffs proved that the defendants intended to inflict emotional distress; or that they knew or should have known that emotional distress was a likely result of their conduct?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Emotional Distress claim, so now proceed to Section XIII. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved that the defendants' conduct was extreme and outrageous, meaning that the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Emotional Distress claim, so now proceed to Section XIII. If your answer is "YES," proceed to Question C of this Section.]

- C. Have the plaintiffs proved that the defendants' conduct was the cause of the plaintiffs' distress?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Emotional Distress claim, so now proceed to Section XIII. If your answer is "YES," proceed to Question D of this Section.]

- D. Have the plaintiffs proved that the emotional distress sustained was severe?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Emotional Distress claim, so now proceed to Section XIII. If your answer is "YES," proceed to Section XIII.]

XIII. TRESPASS

- A. Have the plaintiffs proved invasion, intrusion or entry by the defendants affecting the plaintiff's exclusive possessory interest?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Trespass claim, so now proceed to Section XIV. If your answer is "YES," proceed to Question B of this Section.]

B. Have the plaintiffs proved the defendants acted intentionally?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Trespass claim, so now proceed to Section XIV. If your answer is "YES," proceed to Question C of this Section.]

C. Have the plaintiffs proved that the invasion, intrusion or entry by the defendants caused a direct injury?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Trespass claim, so now proceed to Section XIV. If your answer is "YES," proceed to Question D of this Section.]

D. Were the officers on the premises in the discharge of their official duties, making them licensees?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Trespass claim, so now proceed to Section XIV. If your answer is "NO," proceed to Section XIV.]

XIV. CONVERSION

- A. Have the plaintiffs proved they had ownership, possession or control over the dog before its conversion?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Conversion claim, so now proceed to Section XV. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved the defendants exercised an unauthorized dominion over the dog, to the alteration of its condition or to the exclusion of the plaintiffs rights?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Conversion claim, so now proceed to Section XV. If your answer is "YES," proceed to Section XV.]

XV. NEGLIGENCE – GOVERNMENTAL IMMUNITY

- A. Do you find that either of the plaintiffs were identified to any of the defendants as being at imminent risk of harm at the time the officers entered the plaintiffs' property?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Negligence claim, so now proceed to Section XVIII. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved, by a preponderance of the evidence, that there was a public official to whom it was apparent that his or her conduct was

likely to subject the plaintiffs to the harm at the time the officers entered the plaintiffs' property?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Negligence claim, so now proceed to Section XVIII. If your answer is "YES," proceed to Section XVI.]

XVI. NEGLIGENCE

- A. Have the plaintiffs proved, by a preponderance of the evidence, that the defendants breached the duty of care owed to them by entering the property without a license to do so?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIV below, based upon their Negligence claim, so now proceed to Section XVIII. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the plaintiffs proved, by a preponderance of the evidence, that the defendants' breach of that duty was the proximate cause of their injuries?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Negligence claim, so now proceed to Section XVIII. If your answer is "YES," proceed to Question C of this Section.]

- C. Have the defendants proved, by a preponderance of the evidence, that they were justified to use physical force to defend themselves against

what they believed to be the use or imminent use of physical force in accordance with C.G.S. § 53a-19?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XIX below, based upon their Negligence claim, so now proceed to Section XVIII. If your answer is "NO," proceed to Section XVII.]

XVII. COMPARATIVE NEGLIGENCE

- A. Have the defendants proved, by a preponderance of the evidence, that the plaintiffs' own negligence contributed to their injuries?

_____ Yes

_____ No

[If your answer is "NO," go to Section XVIII. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the defendants proved, by a preponderance of the evidence, that the plaintiffs' own negligence was greater than the negligence of the defendants?

_____ Yes

_____ No

[If your answer is "NO," go to Section XVIII. If your answer is "YES," proceed to Question C of this Section.]

- C. State the percentage (0% to 100%) the plaintiff contributed to her injuries:

_____ %

[Proceed to the next Section.]

XVIII. RECKLESSNESS

- A. Have the plaintiffs proven, by a preponderance of the evidence, that the officers were reckless, that is, their conduct took on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger was apparent, and was more than a mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention?

_____ Yes

_____ No

[If your answer is "NO," the plaintiffs ARE NOT entitled to damages in Section XIV below, based upon their Recklessness claim. If your answer is "YES," proceed to Question B of this Section.]

- B. Have the defendants proved, by a preponderance of the evidence, that they were justified to use physical force to defend themselves against what they believed to be the use or imminent use of physical force in accordance with C.G.S. § 53a-19?

_____ Yes

_____ No

[If your answer is "YES," the plaintiffs ARE NOT entitled to damages in Section XIV below, based upon their Recklessness claim. If your answer is "NO," proceed to Section XIX.]

XIX. DAMAGES

[DO NOT complete this Section if your responses to all of the previous Sections indicate that the plaintiffs ARE NOT entitled to Damages. Complete this Section ONLY if you found that the plaintiffs ARE entitled to DAMAGES under any of the previous Sections.]

- A. Have the plaintiffs sustained damages as a result of the defendants' actions?

_____ Yes

_____ No

[If your answer is "NO," end your deliberations. If your answer is "YES," proceed to Question B of this Section.]

- B. State the amount of compensatory damages, if any, the plaintiffs have proven:

Medical Expenses..... \$ _____

Property Damage..... \$ _____

Pain and Suffering..... \$ _____

Total \$ _____

- C. State the amount of punitive damages, if any, the plaintiffs have proven as to each defendant:

Defendant O'Hare \$ _____

Defendant Pia \$ _____

- D. Calculate the total amount of damages (Section B plus Section C) here:

TOTAL DAMAGES \$ _____

[Your deliberations are over. Sign and date the verdict form and indicate to the court security officer that you have completed your deliberations.]

Date: _____

Signature of Jury Foreperson

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on May 4, 2012, a copy of the foregoing Amended Proposed Jury Interrogatories was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually, and P.P.A : CIVIL ACTION NO. 3:08CV1644(RNC)
as guardian for K.H., a minor child, :
Plaintiffs :
V. :
JOHNMICHAEL O'HARE; :
ANTHONY PIA; and :
CITY OF HARTFORD, :
Defendants. : MAY 18, 2012

OBJECTION TO DEFENDANTS' SUPPLEMENTAL JURY INSTRUCTIONS

The plaintiffs object to the tardy filing of substantive jury instructions concerning matters never before raised by the defendants in this case, which do not apply to the facts, and have no basis in the evidence. The plaintiff would suffer extreme prejudice if the defendants are allowed to raise and argue these new defenses on the eve of trial.

In further objection thereto, the plaintiffs state as follows:

1. The defendants raise for the first time in their supplemental jury instructions, exceptions to the constitutional warrant requirement, including exigent circumstances and the community caretaking function.
2. The defendants did not raise these claims in the answer to the complaint.
3. The defendants did not raise these claims in their summary judgment pleadings. The only defense raised to the fourth amendment illegal search and seizure claim was that the property was not enclosed by a fence (false) and the yard did not constitute curtilage. See Doc. 47.
4. In the joint trial memorandum filed in January, 2011, the defendants still contended in their section entitled “Legal Issues” that the property was not enclosed by a fence and that the side and rear yard did not constitute protected curtilage where the plaintiffs maintained a reasonable

expectation of privacy. At no time did they suggest that the officers acted pursuant to exigent circumstances or that they were acting pursuant to their community care-taking functions.

5. During the lengthy pretrial with the court last month, at no time did the defendants ever suggest that they were going to alter their theories of defense when they presented their case to the court, nor did they request permission to amend their jury instructions after the undersigned suggested that the defenses that were raised were legally without merit.
6. The facts set forth in the parties' summary judgment materials would not permit the application of exceptions to the warrant requirement now raised by the defendants.
7. Allowing the defendants to raise these issues not would cause extreme prejudice to the plaintiff's counsel, who has diligently prepared his case for the past month.

WHEREFORE, the plaintiffs urge the court to prohibit the introduction of evidence concerning so-called "exigent circumstances" or the "community care-taking exception," and deny the defendants' request to file supplemental instructions on these claims.

THE PLAINTIFF–
GLENN HARRIS, P.P.A.,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: civilrights@aol.com
Fed Bar No. ct00119

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn

Jon L. Schoenhorn

- UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

at the plaintiffs home was curtilage, and neither the exigent circumstances nor the community caretaker exceptions to the warrant requirement applied.

6. The defendants moved for summary judgment on the curtilage issue, which would have disposed of the 4th Amendment claim in its entirety, if granted. The exigent circumstances and community caretaker exceptions to the warrant requirement involve undeniable questions of fact, and it turned out that the curtilage issue did as well. The fact that an issue was not raised or briefed at the summary judgment stage does not preclude an issue from being litigated at trial.
7. The defendants have the right to have the plaintiffs held to their burden of proof as to all of the essential elements of the constitutional torts plead in the complaint, and the plaintiffs make no claim that the supplemental requests to charge are inaccurate statements of the law.

Accordingly, the Plaintiffs Objection to Defendant's Supplemental Jury Instructions should be overruled.

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde
Ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on May 21, 2012, a copy of the foregoing Amended Proposed Jury Instructions was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Thomas R. Gerarde
Thomas R. Gerarde

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	MAY 24, 2012

**DEFENDANTS' PROPOSED INTERROGATORIES TO
ASSIST IN DETERMINATION OF QUALIFIED IMMUNITY**

1. Did Officers O'Hare and Pia ever reach a point in the yard of 297 Enfield Street where they were out of sight of a person standing on the public sidewalk looking along the north side of the Plaintiff's home?

Yes_____ No_____

2. Did Officers O'Hare and Pia enter the property at 297 Enfield Street through an open gate?

Yes_____ No_____

3. Did Officers O'Hare and Pia have a reasonable belief that they would find 2 guns in an abandoned gray Nissan Maxima at 297 Enfield Street at the time they entered the property?

Yes_____ No_____

4. If the answer to Question 3 is "No" could reasonable police officers have differed on the issue of whether it was reasonable to believe that the officers would find 2 guns in an abandoned gray Nissan maxima at 297 Enfield Street at the time they entered the property?

Yes_____ No_____

5. Did Officers O'Hare and Pia have a reasonable belief that an emergency existed at the time of their entry onto the property at 297 Enfield Street?

Yes_____ No_____

6. If the answer to Question 5 is "No" could reasonable police officers have differed on the issue of whether it was reasonable to believe that an emergency existed at the time of the officer's entry onto the property at 297 Enfield Street?

Yes_____ No_____

7. Was Officer O'Hare facing imminent injury at the time he fired all 3 shots at the St. Bernard dog?

Yes_____ No_____

8. If the answer to question 7 is "No" could reasonable police officers differ on the issue of whether it was reasonable for Officer O'Hare to believe he was facing imminent injury?

Yes_____ No_____

Date: _____

Signature of Jury Foreperson

JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde
Ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on **May 24, 2012**, a copy of the foregoing **Amended Proposed Jury Interrogatories** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Thomas R. Gerarde
Thomas R. Gerarde

HONORABLE: _____

DEPUTY CLERK _____ RPTR/ECRO/TAPE _____

TOTAL TIME: _____ hours _____ minutes

DATE: _____ START TIME: _____ END TIME: _____

LUNCH RECESS FROM: _____ TO: _____

RECESS (if more than 1/2 hr) FROM: _____ TO: _____

CIVIL NO. _____

=====

VS

Plaintiff's Counsel

Defendant's Counsel

=====

CIVIL JURY/COURT TRIAL

<input type="checkbox"/>Jury of _____ Report <input type="checkbox"/> Jury sworn			
<input type="checkbox"/>Jury Trial held <input type="checkbox"/> Jury Trial continued until _____ at _____			
<input type="checkbox"/> Court Trial begun Court Trial held Court Trial continued until _____			
<input type="checkbox"/> Court Trial concluded <input type="checkbox"/> DECISION RESERVED			
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> Plaintiff(s) rests <input type="checkbox"/> Defendant(s) rests			
<input type="checkbox"/> Briefs(s) due ___ Pltf _____ Deft _____ Reply _____			
<input type="checkbox"/> <input type="checkbox"/> Summations held <input type="checkbox"/> Court's Charge to the Jury			
<input type="checkbox"/> All full exhibits, <input type="checkbox"/> Verdict form, Interrogatories to the jury handed to jury			
<input type="checkbox"/> Jury commences deliberations at _____			
<input type="checkbox"/> Court orders Jury to be fed at Govt. Expense (bill w/copy to Jury Clerk)			
<input type="checkbox"/> SEE page 2 for verdict			
<input type="checkbox"/> COPY TO: JURY CLERK with daily juror attendance sign-in sheet			

☐ Court declares MISTRIAL

☐ Verdict Form filed

☐ VERDICT: _____

☐ Court accepts verdict and orders verdict verified and recorded

☐ Jury Polled

MISCELLANEOUS PROCEEDINGS

HONORABLE: _____

DEPUTY CLERK _____ RPTR/ECRO/TAPE _____

TOTAL TIME: _____ hours _____ minutes

DATE: _____ START TIME: _____ END TIME: _____

LUNCH RECESS FROM: _____ TO: _____

RECESS (if more than 1/2 hr) FROM: _____ TO: _____

CIVIL NO. _____

=====

vs

Plaintiff's Counsel

Defendant's Counsel

=====

CIVIL JURY/COURT TRIAL

<input type="checkbox"/>Jury of _____ Report <input type="checkbox"/> Jury sworn			
<input type="checkbox"/>Jury Trial held <input type="checkbox"/> Jury Trial continued until _____ at _____			
<input type="checkbox"/> Court Trial begun Court Trial held Court Trial continued until _____			
<input type="checkbox"/> Court Trial concluded <input type="checkbox"/> DECISION RESERVED			
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> Plaintiff(s) rests <input type="checkbox"/> Defendant(s) rests			
<input type="checkbox"/> Briefs(s) due ___ Pltf _____ Deft _____ Reply _____			
<input type="checkbox"/> <input type="checkbox"/> Summations held <input type="checkbox"/> Court's Charge to the Jury			
<input type="checkbox"/> All full exhibits, <input type="checkbox"/> Verdict form, Interrogatories to the jury handed to jury			
<input type="checkbox"/> Jury commences deliberations at _____			
<input type="checkbox"/> Court orders Jury to be fed at Govt. Expense (bill w/copy to Jury Clerk)			
<input type="checkbox"/> SEE page 2 for verdict			
<input type="checkbox"/> COPY TO: JURY CLERK with daily juror attendance sign-in sheet			

☐ Court declares MISTRIAL

☐ Verdict Form filed

☐ VERDICT: _____

☐ Court accepts verdict and orders verdict verified and recorded

☐ Jury Polled

MISCELLANEOUS PROCEEDINGS

HONORABLE: _____

DEPUTY CLERK _____ RPTR/ECRO/TAPE _____

TOTAL TIME: _____ hours _____ minutes

DATE: _____ START TIME: _____ END TIME: _____

LUNCH RECESS FROM: _____ TO: _____

RECESS (if more than 1/2 hr) FROM: _____ TO: _____

CIVIL NO. _____

=====

VS

Plaintiff's Counsel

Defendant's Counsel

=====

CIVIL JURY/COURT TRIAL

<input type="checkbox"/>Jury of _____ Report <input type="checkbox"/> Jury sworn			
<input type="checkbox"/>Jury Trial held <input type="checkbox"/> Jury Trial continued until _____ at _____			
<input type="checkbox"/> Court Trial begun Court Trial held Court Trial continued until _____			
<input type="checkbox"/> Court Trial concluded <input type="checkbox"/> DECISION RESERVED			
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/># _____ Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> Oral Motion _____	<input type="checkbox"/> granted	<input type="checkbox"/> denied	<input type="checkbox"/> advisement
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> _____	<input type="checkbox"/> filed	<input type="checkbox"/> docketed	
<input type="checkbox"/> Plaintiff(s) rests <input type="checkbox"/> Defendant(s) rests			
<input type="checkbox"/> Briefs(s) due ___ Pltf _____ Deft _____ Reply _____			
<input type="checkbox"/> <input type="checkbox"/> Summations held <input type="checkbox"/> Court's Charge to the Jury			
<input type="checkbox"/> All full exhibits, <input type="checkbox"/> Verdict form, Interrogatories to the jury handed to jury			
<input type="checkbox"/> Jury commences deliberations at _____			
<input type="checkbox"/> Court orders Jury to be fed at Govt. Expense (bill w/copy to Jury Clerk)			
<input type="checkbox"/> SEE page 2 for verdict			
<input type="checkbox"/> COPY TO: JURY CLERK with daily juror attendance sign-in sheet			

☐ Court declares MISTRIAL

☐ Verdict Form filed

☐ VERDICT: _____

☐ Court accepts verdict and orders verdict verified and recorded

☐ Jury Polled

MISCELLANEOUS PROCEEDINGS

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
United States District Court
District of Connecticut
FILED AT HARTFORD

GLEN HARRIS, individually and
P.P.A. as guardian for K.H., a
minor child,

Plaintiff,

v.

JOHNMICHAEL O'HARE, ET AL.,

Defendants.

5/29 2012
Robert D. Tabora, Clerk
By [Signature]
Deputy Clerk

CASE NO. 3:08CV1644 (RNC)

VERDICT FORM

We the Jury unanimously find as follows:

I. LIABILITY

A. Claims under 42 U.S.C. § 1983

1. Fourth Amendment: Unreasonable Search

a. Has the plaintiff proven that either of the defendants
violated the Fourth Amendment's prohibition against
unreasonable searches by entering the curtilage of his home
without a warrant in the absence of an exception to the
warrant requirement?

Johnmichael O'Hare Yes No X

Anthony Pia Yes No X

If your answer is "Yes" for either defendant, go to subpart b.

If your answer is "No" for both defendants, go to Question 2.

b. Has the plaintiff proven that the defendants conspired to violate his Fourth Amendment right to be free of unreasonable searches?

Yes _____ No _____

2. Fourth Amendment: Unreasonable Seizure

a. Has the plaintiff proven that Officer O'Hare violated the Fourth Amendment's prohibition against unreasonable seizures when he killed the plaintiff's dog?

Yes _____ No X

If your answer is "Yes," go to subpart b. If your answer is "No," go to Question 3.

b. Has the plaintiff proven that Officer Pia is liable for the unreasonable seizure because he had a reasonable opportunity to intervene to prevent it but failed to do so?

Yes _____ No _____

3. Fourteenth Amendment: Due Process

Has the plaintiff proven that when Officer O'Hare shot the dog, he engaged in conduct that shocks the conscience and thus violated the Due Process Clause of the Fourteenth Amendment?

Yes ☐ No ☒

If you have answered "Yes" in response to any of Questions 1-3, you have found a violation of either the plaintiff's or K.'s constitutional rights. In that event, go to Question 4. If you have answered "No" in response to Questions 1-3, then skip Question 4 and go to Question 5.

4. Causation

Has the plaintiff proven that he or K. suffered injuries that were proximately caused by a violation of his or her constitutional rights?

Yes ☐ No ☐

B. Claims Under Connecticut Tort Law

5. Intentional Infliction of Emotional Distress

Has the plaintiff proven that Officer O'Hare engaged in extreme and outrageous conduct that was intended to cause emotional distress to K. and did in fact cause her severe emotional distress?

Yes No X

6. Trespass

Has the plaintiff proven that either of the defendants trespassed on his land in violation of state law?

Johnmichael O'Hare Yes No X

Anthony Pia Yes No X

7. Conversion

Has the plaintiff proven that either of the defendants committed conversion under state law by depriving him of his dog?

Johnmichael O'Hare Yes No X

Anthony Pia Yes No X

If you have answered "Yes" in response to any of Questions 1-7, go to Part II. If you have answered "No" in response to Questions 1-7, your deliberations are complete.

II. DAMAGES

A. Compensatory Damages

1. Amount of Compensatory Damages

If you have found either of the defendants liable for a violation of the plaintiff's or K.'s constitutional rights, and you have found that the plaintiff or K. sustained injuries as a proximate result of the violation (by answering "Yes" to Question 4); or if you have found either defendant liable for intentional infliction of emotional distress, trespass or conversion, what amount of damages do you award to reasonably compensate the plaintiff or K. for his or her injuries proximately caused by the unlawful conduct?

Glenn Harris \$ _____

K. \$ _____

B. Nominal Damages

2. Amount of Nominal Damages

If you have found that the plaintiff's or K.'s constitutional rights were violated by a defendant (by answering "Yes" to a question in Part I.A.), but you have found that the plaintiff has failed to prove any injuries proximately caused by that defendant's unlawful conduct, what nominal damages do you award each plaintiff?

Glenn Harris \$ _____

K. \$ _____

C. Punitive Damages: Constitutional Claims

3. Assessment of Punitive Damages

a. Do you find the plaintiff has proven that punitive damages should be assessed against either defendant for violating Mr. Harris's constitutional rights?

Johnmichael O'Hare Yes _____ No _____

Anthony Pia Yes _____ No _____

b. Do you find the plaintiff has proven that punitive damages should be assessed against either defendant for violating K.'s constitutional rights?

Johnmichael O'Hare Yes _____ No _____

Anthony Pia Yes _____ No _____

4. Amount of Punitive Damages

a. If you have found that the plaintiff has proven that punitive damages should be assessed against one or both defendants for a violation of his constitutional rights, enter the amount of punitive damages you award the plaintiff against each such defendant.

Johnmichael O'Hare \$ _____

Anthony Pia \$ _____

b. If you have found that the plaintiff has proven that punitive damages should be assessed against one or both defendants for a violation of K.'s constitutional rights, enter the amount of punitive damages you award K. against each such defendant.

Johnmichael O'Hare \$ _____

Anthony Pia \$ _____

C. Punitive Damages: State Law Claims

5. Assessment of Punitive Damages

a. Do you find that the plaintiff has proven that punitive damages should be assessed against either or both defendants on Mr. Harris's state law claims of intentional infliction of emotional distress, trespass and conversion? (If you answer "Yes" as to either defendant, the Court will determine the amount of punitive damages to be awarded in a separate proceeding.)

Johnmichael O'Hare Yes _____ No _____

Anthony Pia Yes _____ No _____

b. Do you find that the plaintiff has proven that punitive damages should be assessed against either or both defendants on K.'s state law claims of intentional infliction of emotional distress, trespass and conversion? (If you answer "Yes" as to either defendant, the Court will determine the amount of punitive damages to be awarded in a separate proceeding.)

Johnmichael O'Hare Yes _____ No _____

Anthony Pia Yes _____ No _____

You have completed your deliberations. The Foreperson should sign and date the Verdict Form.

Date 5/29/2012

Foreperson Signature ~

United States District Court
District of Connecticut
FILED AT HARTFORD

GLEN HARRIS, individually and
P.P.A. as guardian for K.H., a
minor child,

Plaintiff,

v.

JOHNMICHAEL O'HARE, ET AL.,

Defendants.

5/29/2012
Robert D. Tabor, Clerk
By Debra Glynn
Deputy Clerk

CASE NO. 3:08CV1644 (RNC)

SPECIAL INTERROGATORIES

We the Jury unanimously find as follows:

A. You have found that the entry onto plaintiff's property did
not constitute an unreasonable search under the Fourth Amendment:

1. Did you find that the area of the property that the defendants
entered was curtilage?

Yes _____ No _____

We did not reach a conclusion on this question X

2. Did you find that the exigent circumstances exception applies?

Yes X No _____

We did not reach a conclusion on this question _____

You have completed your deliberations on these interrogatories.
The Foreperson should sign and date the Special Interrogatories
form.

5/29/2012
Date

Foreperson Signature _____

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JUNE 21, 2012

RENEWED MOTION FOR JUDGMENT BASED ON QUALIFIED IMMUNITY

Defendants, Johnmichael O'Hare and Anthony Pia, pursuant to FRCP 50(b) hereby renew their Motion for Judgment as a matter of law based on Qualified Immunity, with respect to the Plaintiffs' 4th Amendment illegal search claim. As more particularly set forth below, based on the totality of circumstances reasonable police officers in December 2006 could disagree on (1) whether the part of the property entered by Johnmichael O'Hare and Anthony Pia was curtilage; (2) whether the exigent circumstances exception to the warrant requirement applied; and (3) whether the community caretaker exception to the warrant requirement applied. Accordingly the Defendants are entitled to judgment as a matter of law based on Qualified Immunity.

A memorandum of points and authorities is filed herewith.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde
ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on June 21, 2012, a copy of the foregoing Renewed Motion for Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Thomas R. Gerarde
Thomas R. Gerarde

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JUNE 21, 2012

**MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION FOR JUDGMENT
BASED ON QUALIFIED IMMUNITY**

**I. Reasonable Police Officers Could Disagree on Whether the Part of the Property
Entered by the Defendants was Curtilage.**

**a. Evidence at trial shows no reasonable expectation of privacy in the area entered
by the defendants.**

The evidence at trial was clear that the defendants entered the front yard of the Plaintiff's property and then moved along the north side of the Plaintiff's house to the rear corner before retreating when the Plaintiff's dog was spotted. Plaintiff Glenn Harris acknowledged that strangers could walk to his front door without his objection, and Plaintiffs counsel conceded at argument that the front walk and door area was not curtilage. The side of the plaintiffs home was only a few feet to the north of this front door area. Also undisputed was the fact that the officers did not have to climb a fence or breach any other type of barrier in order to reach the rear corner of the plaintiffs house. This point is accented by the testimony that nothing prevented the plaintiff's dog from running from the rear of the yard, around the north side of the house to the front yard, and onto the driveway and even out into the street. It was undisputed that the area

entered by the police was within full view of someone standing on the public sidewalk. Plaintiff Glenn Harris admitted that he did nothing to attempt to obscure this area from view from the public sidewalk. Plaintiff Glen Harris also admitted there was no idicia of an expectation of privacy in this area, such as a patio a chair, personal belongings, toys, tools or anything else. The photographs in evidence show that the strip of land on the north side of the house was only a few feet wide, and had no objects on it that might have been a clue to a reasonable police officer that the plaintiff had an expectation that this area of his yard would be under the same umbrella of protection as the interior of his home.

b. Caselaw Existing as of December 2006, did not Clearly Establish that Entry on the Plaintiffs Property on the North Side of His House Under the Circumstances was Entry onto Curtilage of the Home.

1. The Constitutional Elements of the Curtilage

In Katz v. United States, 389 U.S. 347, 351 (1967), the Court held that the Fourth Amendment protects people, not places. From this, it follows that the Fourth Amendment applies only where an individual has an expectation of privacy that society recognizes as legitimate. Id. at 361 (Harlan, J., concurring). For example, the Fourth Amendment generally applies to an individual's private activities conducted in the sanctity of the home, where an individual clearly has an expectation of privacy, yet provides no protection in the open fields on an individual's property, where an expectation of privacy is not considered reasonable. In between these two extremes falls the curtilage, which is the area outside the home that is afforded Fourth Amendment protection against unreasonable searches and seizures. The analysis for determining the applicability of the Fourth Amendment in these situations remains unchanged: the individual must have a reasonable expectation of privacy.

The analysis for determining whether a reasonable expectation of privacy existed for areas outside of the home was established in United States v. Dunn, 480 U.S. 294, 301 (1987). The Court in Dunn believed that curtilage should be determined with particular reference four factors: 1) the proximity of the area claimed to be curtilage to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) the steps taken by the resident to protect the area from observation by people passing by. Id. The Court warned that combining these four factors does not produce a finely tuned formula that, when mechanically applied, yields a ‘correct’ answer to all extent-of-curtilage questions. Id. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment Protection. Id. The touchstone of the inquiry is whether the defendant had a reasonable expectation of privacy in the area in question. United States v. Reilly, 76 F.3d 1271, 1276 (2d Cir. 1996). It follows from this that areas of a plaintiff’s land knowingly exposed to the public are not protected by the Fourth Amendment. California v. Ciraolo, 476 U.S. 207, 213 (1986); Katz, 389 U.S. at 351-52 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”)

a. Proximity of the Area to the Home

There is no fixed distance that may be applied to determine where the curtilage ends and where the open field begins. Hart v. Myers, 183 F. Supp. 2d 512, 522-23 (D. Conn. 2002). Rather, the extent of the curtilage must be determined on a case by case basis. Id. Simply because an area is close in proximity to the home does not automatically mandate that area be

considered curtilage. United States v. Hogan, 122 F. Supp. 2d 358, 362 (E.D. N.Y. 2000) (holding that police entry onto a driveway to conduct warrantless dog sniff did not implicate the Fourth Amendment despite the fact that the physical proximity of the driveway was very close to the house). In United States v. Cousins, 455 F.3d 1116, 1119-20 (10th Cir. 2006), the police entered the defendant's side yard which was immediately adjacent to the defendant's home in order to corroborate a tip provided by an electric company worker who was just at the home. Id. at 1119. From that position, the police looked through three holes in a gate into the backyard to find marijuana plants being grown. Id. The court held that, despite the officer's proximity to the home, their location was not considered curtilage and thus was not protected by the Fourth Amendment. Id. at 1122. The curtilage may extend further in rural settings than urban settings. Reilly, 76 F.3d at 1277; see United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980) ("[I]t is doubtful that the curtilage concept has much applicability to multifamily dwellings..."); Commonwealth v. Thomas, 267 N.E.2d 489, 491 (Mass. 1971) ("In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control....In such an apartment house, a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control."); see also United States v. Agapito, 620 F.2d 324, 331 (2d. Cir. 1980) (holding that no Fourth Amendment violation occurred where police pressed their ear to a shared door). The urban-rural setting distinction is consonant with the Court's statements in Katz, that the Fourth Amendment protects people, not places. See 389 U.S. at 351. Thus, in a rural setting, an individual may have a reasonable expectation of privacy in areas that are further from the home because buildings and neighbors are more spread out. See Reilly, 76 F.3d at 1277 (holding that the defendant had a reasonable expectation of privacy

in a cottage located 375 feet away from the main residence). On the other hand, in an urban setting, an individual's expectation of privacy may not extend beyond his or her apartment unit because buildings are close to one another and neighbors are abundant. See Arboleda, 633 F.2d at 992 (holding that the defendant had no reasonable expectation of privacy in a fire escape for a multi-unit residential building). The rationale underlying this distinction is that there can be no reasonable expectation of privacy in that which is exposed to third parties, regardless of whether it is information being disclosed or an area of land being exposed. See California v. Greenwood, 486 U.S. 35, 40 (1988) (holding that there is no reasonable expectation of privacy in garbage placed at the side of the road for garbage collectors to pick up); Smith v. Maryland, 442 U.S. 735, 742 (1979) (holding that there is no reasonable expectation of privacy in phone numbers conveyed to the telephone company); United States v. Hoffa, 385 U.S. 293, 302-303 (1966) (holding that Fourth Amendment protection does not apply to an individual's misplaced confidence in another individual).

b. Presence of an Enclosure Surrounding the Area and the Home

In many cases, a fence may be relevant to establish an individual's expectation of privacy. Dunn, 480 U.S. at 301. However, the relevance is only in the fact that a fence tends to exclude an individual from a particular area. See Hogan, 122 F. Supp. 2d at 362; People v. Lieng, 190 Cal. App. 4th 1213, 1225 (2011); State v. Loomis, 436 So. 2d 1103, 1104 (Fla. Dist. Ct. App. 1983). If a fence exists, but does not obscure others' sight of the area sought to be protected, it is unreasonable for an individual to believe he or she has an expectation of privacy in that area. See Loomis, 436 So. 2d at 1104 (holding that three and one-half to four foot high chain-link fence running around the sides of the yard was insufficient to establish an expectation of privacy). It is not true that all fences must be tall stockade fences in order to establish an

expectation of privacy that is reasonable. A fence, despite being see-through, may nonetheless be effective in keeping individuals out of a particular area. Thus, fences tend to be relevant to the expectation of privacy analysis in rural settings, where a large area may be fenced off and the entire area may not be visible to an outsider standing at the perimeter of the fence. In such situations, it is reasonable for an individual to have an expectation of privacy in an area that is fenced in and not visible to an individual standing at the perimeter of the fence. However, in an urban setting, it is likely for the area being fenced in to be entirely visible to an outsider standing at the perimeter of the fence. In such cases, it is unreasonable for the existence of a fence to establish an expectation of privacy in a particular area. In Hogan, a dilapidated stockade fence extended from the side of the house and ran through the area behind the house, however, the front of the house was not enclosed. 122 F. Supp. 2d at 362. The court ruled in this case that the police entering the driveway and the perimeter of the house did not violate the Fourth Amendment because the area was not curtilage. Id. In Lieng, the agents went through an opening in the fence, which was “probably a gate,” onto the defendant’s property. 190 Cal. App. 4th at 1225. The court held that the agents did not violate the defendant’s Fourth Amendment protection because the area was not considered curtilage, despite the existence of the fence. Id. In Loomis, the court held that the police had not violated the defendant’s Fourth Amendment when the defendant’s property was enclosed by a three and one-half to four foot high chain-link fence around the sides of the yard. 436 So. 2d at 1104. The court did not believe that a fence of this sort created the requisite expectation of privacy necessary for Fourth Amendment protection. Id. But see Brocuglio v. Proulx, 478 F. Supp. 2d 297, 304 (D. Conn. 2007) (holding that defendant had a reasonable expectation of privacy in his entire backyard that was surrounded by a six-foot solid stockade fence that was primarily opaque); State v. Ryder, 301 Conn. 810, 821-

22 (2011) (holding that a three-foot high electronic security gate and fence surrounding a home constituted the outer boundary of that home's curtilage).

c. Nature of the Uses to which the Area is Put

One way to prove that an individual has an expectation of privacy in a particular area is if that individual actually uses that area to engage in conduct that is private. Dunn, 480 U.S. at 301. However, just because an individual engages in private conduct in a particular area does not necessarily mean that the individual's expectation of privacy is reasonable. See Simko v. Town of Highlands, 276 Fed. Appx. 39, 41 (2d Cir. 2008); Esmont v. City of New York, 371 F. Supp. 2d 202, 212 (E.D.N.Y. 2005); Hogan, 122 F. Supp. 2d at 362; Lieng, 190 Cal. App. 4th at 1224-25. Therefore, this factor is relevant only to establishing a subjective expectation of privacy, and other factors must be considered to determine whether that expectation is reasonable by society's standards. In Simko, the court held that the police search of the shed and surrounding area did not constitute curtilage where the structure was clearly meant for dogs and the surrounding area was used as a "poop pit" and thus, was not likely to be used for private home activities. 276 Fed. Appx. at 41. In Esmont, the court held that the entry on to the defendant's private property was not a Fourth Amendment violation because the defendant presented no evidence that the area was used for intimate activities and thus, it was not considered curtilage. 371 F. Supp. 2d at 212. In Hogan, the court held that the driveway and the area surrounding the house were not part of the curtilage because the area was not used for any purpose other than entrance or egress. 122 F. Supp. 2d at 362. In Lieng, the court held that the driveway was not considered curtilage and was not subject to Fourth Amendment protection because the location was not intimately tied to the home. 190 Cal. App. 4th at 1224-25.

d. Steps Taken to Protect the Area from Observation

Another way to prove that an individual has an expectation of privacy in a particular area is to consider the steps that an individual has taken to protect the area in question from observation by others. Dunn, 480 U.S. at 301. If an individual has taken steps to protect an area from observation, then it is clear that he or she has an expectation of privacy in that area. However, just because the individual has an expectation of privacy does not necessarily make that expectation reasonable. Setting up a fence is considered a step taken to obscure an area from observation. However, even with the purpose to obscure visibility, a chain link fence—which is completely see through—is not a reasonable way to achieve such a goal and thus, the individual’s expectation of privacy under these circumstances would be unreasonable—assuming that the chain link fence allowed the entire fenced in area to be visible. From this, it is clear that an individual has no expectation of privacy in an area that is knowingly exposed to the public. Katz, 389 U.S. at 351-52; Castanza v. Town of Brookhaven, 700 F. Supp. 2d 277 at 287; Esmont, 371 F. Supp. 2d at 212. In Simko, the court held that the police search of a shed and surrounding yard was not a Fourth Amendment violation because the area was relatively open to exposure to neighboring properties, if not the public at large. 276 Fed. Appx. at 41. In Castanza, the court held that there was no Fourth Amendment violation where town workers entered the defendant’s front and side yard to remove litter and other property that the defendant had been ordered to clean up. 700 F. Supp. 2d at 288. In determining whether a Fourth Amendment violation had occurred, the court found significant the fact that the garbage was viewable from the street, which is clearly public, and that a visual observation from a public place is no search at all. Id. at 287. In Esmont, the court held that no Fourth Amendment violation occurred when health workers entered the defendant’s property to conduct a compliance inspection, finding significant the fact that the yard was in full view of the streets and rail road tracks. 371 F. Supp.

2d at 212. In United States v. Williams, 219 F. Supp. 2d 346, 360 (W.D.N.Y. 2002), the court held that there is no expectation of privacy in a driveway that is exposed to the public nor is there such an expectation in a vehicle parked in that driveway that was visible from the street. In United States v. Reyes, 283 F.3d 446, 465 (2d Cir. 2002), the court equated accessibility with visibility, holding that driveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants' houses. In United States v. Ventling, 678 F.2d 63, 64, 66 (8th Cir. 1982), the court held that a driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view and thus there can be no reasonable expectation of privacy. In Hogan, the court held that the area surrounding the driveway and house was not curtilage because the area was not obscured from public view. 122 F. Supp. 2d at 362.

In sum, the Fourth Amendment protects people, not places. See Katz, 389 U.S. at 351. The fact that an area is close to the home or even within the home is not determinative of Fourth Amendment protection. Id. The basis for determining when and where the Fourth Amendment applies turns on an analysis of whether the aggrieved individual had a reasonable expectation of privacy in the area searched. Id. at 361 (Harlan, J., concurring). From this, it becomes clear that an individual has no reasonable expectation of privacy in an area that is knowingly exposed to the public, regardless of where that area is. A person living in a single story ranch with a large window that has no blinds or curtains looking into the living room does not provide the individual with expectation of privacy in that room despite the fact that the room is in the "sanctity" of the home. In every case, the standard for Fourth Amendment applicability is a reasonable expectation of privacy. The reason for the Dunn factors is to inform the expectation of privacy analysis in regard to the area surrounding the home. The factors are not exclusive, nor

is any single factor dispositive. Each factor is relevant only to the extent that it informs the expectation of privacy analysis.

2. Qualified Immunity

The defense of qualified immunity “shields government officials from liability for civil damages as a result of their performance of discretionary functions, and serves to protect government officials from the burdens of costly, but insubstantial lawsuits.” Lennon v. Miller, 66 F.3d 416, 420 (2d Cir.1995). “[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are ‘shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Wilson v. Layne, 526 U.S. 603, 609 (1999) (*quoting* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Huminski v. Corsones, 386 F.3d 116, 143 (2d Cir.2004) (*quoting* Shechter v. Comptroller of the City of New York, 79 F.3d 265, 268 (2d Cir.1996)).

Qualified immunity shields them from liability if their actions were objectively reasonable, as evaluated in the context of legal rules that were clearly established at the time. Loria v. Gorman, 306 F.3d 1271, 1281 (2d Cir.2002) (*quoting* Poe v. Leonard, 282 F.3d 123, 132 (2d Cir.2002 “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” Loria v. Gorman, 306 F.3d 1271, 1281 (2d Cir.2002). at 1281-82 (*quoting* Saucier, 533 U.S. at 202) (additional citations omitted). In other words, if a defendant violated a right, the court must “analyze the objective reasonableness of the [defendant's] belief in the lawfulness of his actions.” Loria v. Gorman, 306 F.3d 1271, 1282 (2d Cir.2002). The protection of qualified immunity applies regardless of whether the government official's error is

“a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”

Pearson v. Callahan, 129 S.Ct. 808, 815 (2009) *citing* Groh v. Ramirez, 540 U.S. 551, 567 (2004); *see* Butz v. Economou, 438 U.S. 478, 507 (1978) (noting that qualified immunity covers “mere mistakes in judgment, whether the mistake is one of fact or one of law”).

Based on the survey of caselaw above, reasonable police officers could disagree as to whether the section of property entered onto by the defendants was curtilage. Accordingly the defendants are entitled to judgment as a matter of law based on qualified immunity.

II. Reasonable Police Officers Could Disagree on Whether Probable Cause and Exigent Circumstances Existed that Justified Entry onto the Plaintiffs Property

A. The Exigent Circumstances Exception to the Warrant Requirement

The warrant requirement of the Fourth Amendment guarantees the fundamental right to be free from government intrusion into an area where an individual has a reasonable expectation of privacy. Payton v. N.Y., 445 U.S. 573, 85-86, 89-90 (1980). However, it is well-settled that the warrant requirement must yield in those situations where exigent circumstances demand that law enforcement agents act without delay. *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-99.

A district court’s determination as to whether exigent circumstances existed is fact-specific, and will not be reversed on appeal unless clearly erroneous. United States v. Cattouse, 846 F.2d 144, 146 (2d Cir. 1988). The test for determining whether a warrantless search is justified by exigent circumstances is an objective one that turns on the district court’s examination of the totality of the circumstances confronting law enforcement agents in the particular case. United States v. MacDonald, 916 F.2d 766, 769 (2d Cir. 1990); United States v. Zabare, 871, F.2d 282, 290-91 (2d Cir. 1989); United States v. Miles, 889 F.2d 382, 383 (2d Cir. 1989).

Exigent circumstances come in several forms, such as a need to enter a protected area to prevent harm to an individual, Brigham City, Utah v. Stuart, 547 U.S. 398 (2006), to enter a protected area to prevent the destruction or removal of evidence, United States v. Gallo-Roman, 816 F.2d 76 (2d Cir. 1987), or to enter a protected area while in hot pursuit of a fleeing suspect, Welsh v. Wisconsin, 466 U.S. 740 (1984).

In the case of exigency based on the destruction of evidence, an officer must have probable cause to believe that the evidence can be found at the location to be searched as well as an urgent need to take action. Gallo-Roman, 816 F.2d at 79; United States v. Martinez-Gonzalez, 686 F.2d 93, 100 (2d Cir. 1982); United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978). To guide this determination, the Second Circuit Court of Appeals has adopted the factors set out in Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970), as guideposts intended to facilitate the district court's determination. MacDonald, 916 F.2d at 769. The Dorman factors may be summarized as follows: 1) the gravity or violent nature of the offense with which the suspect is to be charged; 2) whether the suspect is reasonably believed to be armed; 3) a clear showing of probable cause to believe the suspect committed the crime; 4) strong reason to believe that the suspect is in the premises being entered; 5) a likelihood that the suspect will escape if not swiftly apprehended; and 6) the peaceful circumstances of the entry. These factors are not intended as an exhaustive list, but rather merely an illustrative sampling of the kinds of facts to be taken into account. Id. at 770.

The Dorman factors, although informative, are not directly applicable to recovery of property scenarios because there is no specific suspect of interest to the law enforcement officers. Rather, in this situation, the law enforcement officers preemptively sought to confiscate the evidence of illegal weapons before anyone else had the opportunity to do so. Nevertheless,

the requirements of establishing probable cause and exigency that the evidence would be taken or destroyed should remain unchanged.

1. Probable Cause to Believe the Illegal Guns were Located at 297 Enfield Street

Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a reasonable man of ordinary caution to conclude that a crime has been, or is being, committed. Brinegar v. United States, 338 U.S. 160, 175-76 (1949). Probable cause is a practical, non-technical conception. Id. at 176.

a. Establishing Probable Cause Through Third Party Information

Probable cause may be established through information provided by a third party to a law enforcement officer. Ill. v. Gates, 462 U.S. 213, 228-29 (1983). The adequacy of a third party's information in establishing probable cause must be evaluated based on the totality of the circumstances. Id. at 230-31; United States v. Steppello, 664 F.3d 359, 363-64 (2d Cir. 2011). In Steppello, the police, in the lawful execution of a search warrant, apprehended an individual named Szuba, who agreed to cooperate with the police by identifying his cocaine dealer. 664 F.3d at 361. The officers had Szuba call his cocaine dealer and arrange a purchase. Id. The officers could not hear what the person on the other end of the telephone was saying to Szuba, but Szuba said he arranged a buy that would occur in twenty minutes. Id. The police hid at the location where the buy was to take place and apprehended Szuba's cocaine dealer—the defendant—who arrived twenty minutes later. Id. at 362. The district court held that the officers did not have probable cause to conduct the arrest, however this judgment was overruled by the

Second Circuit Court of Appeals. Id. at 363, 366. The Court of Appeals held that the district court failed to examine the totality of the circumstances and that the district court failed to evaluate the facts in light of the training and experience of the arresting agents. Id. at 366. The court of appeals believed that the district court erred in discounting the information provided by Szuba simply because he had no proven record of truthfulness or accuracy. Steppello, 664 F.3d at 365. The court recognized that criminals caught red-handed may be reliable sources of information because they seek to cooperate in order to obtain leniency in the charges brought against them. Id. at 366. Furthermore, Szuba was considered reliable because he disclosed the information while face-to-face with the police, rather than anonymously through a letter or phone tip. Id. at 361; see Gates, 462 U.S. at 227 (holding that an anonymous letter, without more, would not support a showing of probable cause). The fact that Szuba was face-to-face with the police tends to establish his reliability because if the information does not check out, the police know exactly who to ask about the false information. Steppello, 664 F.3d at 365. The court also found significance in the fact that Szuba provided detailed information to the police, predicting exactly what the defendant would do and when he would do it, as well as describing the defendant's house and car. Id. at 366; see also United States v. Gagnon, 373 F.3d 230, 237-238 (2d Cir. 2004) (finding sufficient evidence to support probable cause where informant with no history of reliability disclosed information, with specific details, face-to-face with officers regarding a crime he was a part of). But see, United States v. Clark, 638 F.3d 89, 96-97 (2d Cir. 2011) (finding insufficient evidence to support probable cause to search an entire multi-unit dwelling where informant with no history of reliability made the bare, conclusory statement to officers that the unit was in the defendant's "full control").

b. Establishing Probable Cause Through an Officer's Past Experience

An officer's past experience with criminal behavior and training in combating crime may be considered to establish probable cause. See United States v. Delossantos, 536 F.3d 155, 161 (2d Cir. 2008); United States v. Gaskin, 364 F.3d 438, 457 (2d Cir. 2004). In Delossantos, the court held that there was sufficient evidence to support probable cause to arrest a man who drove a drug dealer to and from drug deals when considering the officers' expertise in the type of situation. 536 F.3d at 160. The court noted that "[s]ome patterns of behavior which may seem innocuous enough to the untrained eye may not appear so innocent to the trained police officer who has witnessed similar scenarios numerous times before. As long as the elements of the pattern are specific and articulable, the powers of observation of an officer with superior training and experience should not be disregarded." Id. at 161. Similarly, in Gaskin, the court found sufficient evidence to support probable cause to search defendant's car where officers knew defendant was a known drug dealer and had been arrested with, among other things, \$3,895 in cash on his person. 364 F.3d at 457. The court recognized that experience and training may allow a law enforcement officer to discern probable cause from facts and circumstances where a layman might not. Id. at 457; see also United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987) (holding that DEA agent with experience in drug trafficking interdiction and first hand knowledge of defendant's drug trafficking was sufficient basis for probable cause to search defendant's residence); United States v. Price, 599 F.2d 494, 501 (2d Cir. 1979) (finding sufficient evidence to support reasonable suspicion for a stop conducted by a DEA official with six years experience of a defendant who appeared nervous in the airport, carried unmarked luggage, and continually scanned the faces of the people in the terminal); United States v. Granderson, 182 F. Supp. 2d 315, 320, 324 (W.D. N.Y. 2001) (finding that police officer with

knowledge of the area had sufficient evidence to establish probable cause to search for drugs when defendant exchanged money and a zip-lock baggie with another).

2. Urgent Need to Act Without First Obtaining a Warrant

The exigent circumstances exception to the warrant requirement requires an objectively reasonable belief that entry is necessary to prevent the consequences of the exigency. See United States v. Klump, 536 F.3d 113, 118 (2d Cir. 2008) (smell of smoke outside warehouse justified warrantless entry into the warehouse to determine if there was a fire); Brigham City, 547 U.S. at 406 (officers who saw a fight in the kitchen of a home were justified in a warrantless entry into the home to break up a fight); MacDonald, 916 F.2d at 770 (warrantless entry into the home of known drug dealer was justified to prevent destruction of evidence); Zabare, 871 F.2d at 290 (warrantless entry into drug dealer's residence was justified to prevent destruction of evidence). To determine whether an officer's belief of urgent need is objectively reasonable, the court must examine the totality of the circumstances confronting law enforcement agents in the particular situation. MacDonald, 916 F.2d at 769. The Dorman factors provide relevant guideposts for this determination, however, they are not meant to provide an exclusive list of factors to consider. Id. at 770.

a. Establishing Urgency Through an Officer's Past Experience

Among the factors to be considered that are not expressly recognized in Dorman is the law enforcement officer's prior experience with the particular type of situation. Klump, 536 F.3d at 118; United States v. Talkington, 843 F.2d 1041, 1044 (7th Cir. 1988) ("In determining whether agents reasonably feared destruction, appropriate inquiry is whether the facts...would lead reasonable experienced agents to believe that evidence might be destroyed."); United States v. Timberlake, 896 F.2d 592, 596 (D.C. Cir. 1990) (determining urgent need focuses on what a

reasonable experienced police officer would believe). In Zabare, defendant sold counterfeit tickets to public amusement events. 871 F.2d at 284-86. FBI agents set up a sting operation where they sold counterfeit tickets to the defendant. Id. The tickets were marked “void” in case the defendant attempted to sell the tickets to unsuspecting customers. Id. The agents believed that the defendant would destroy the tickets when he saw they were marked “void” and all other evidence of his unlawful activity and thus, the agents entered the defendant’s home to arrest him without a warrant. Id. The court held that this warrantless entry was justifiable on the basis that destruction of evidence was imminent and there was no time to secure an arrest warrant. Id. at 292. The court noted that if an experienced officer reasonably believes that those inside a residence are likely to be alarmed and destroy evidence, then a warrantless intrusion is justified, even if it eventually develops that the residence was unoccupied or those inside residence had no intention of destroying any contraband. Id. In Gallo-Roman, the defendant attempted to transport cocaine hidden in a photograph frame’s false back. 816 F.2d at 78-79. The DEA intercepted the mail and replaced the cocaine with a mixture of cocaine and dextrose before forwarding them to the defendant. Id. The agents apprehended the defendant in his home without a warrant after he picked the packages up from the post office. Id. The court held that the agent’s belief that the defendant would recognize the packages had been tampered with and destroy the evidence justified the agent’s warrantless entry into the defendant’s home. Id. at 79; see Zabare, 871 F.2d at 291; Gallo-Roman, 816F.2d at 79-80.

b. Establishing Urgency Through the Time Necessary to Obtain a Warrant

Another factor to be considered in the urgency determination is the effect the delay necessary to obtain a warrant would have on the police activity. Dorman, 435 F.2d at 394. The fact that a delay may be encountered is not controlling on whether a warrant is required; securing

a warrant always involves some additional time. Chappell v. United States, 342 F.2d 935, 938 (1965). The Supreme Court of the United States held that mere convenience or saving time will not justify a warrantless search and that some element of emergency must exist that would render the search ineffective if delayed by the time necessary to obtain a warrant. Camara v. Mun. Court & Cnty. of S.F., 387 U.S. 523, 533 (1967); see Mich. v. Tyler, 436 U.S. 499, 509 (1978) (“[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action *and no time to secure a warrant*,” such as entry into burning building (emphasis added)). In Dorman, the fact that it was late at night and the Justice who had been assigned to issue warrants could not be reached was significant to determining that exigent circumstances were present. 435 F.2d at 394-95. That court noted the difficulty in obtaining warrants late at night or early in the morning before the start of a normal working day. Id. at 395; see also United States v. Farra, 725 F.2d 197, 197-99 (2d Cir. 1984) (warrantless entry into hotel room was permitted because obtaining a warrant in the middle of the night may have led to destruction of evidence); Campbell, 581 F.2d at 26-27 (warrant did not need to be obtained where the process would take several hours and the evidence may be destroyed); United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir. 1988) (holding that the time necessary to obtain a warrant is an important consideration and that three hours was too long of a delay to require a warrant, especially when the defendants may have been aware of the police activity).

In many cases, destruction of evidence, particularly a stash of drugs, will occur in a shorter period of time than is required to obtain a warrant. See Zabare, 871 F.2d at 292; Aquino, 836 F.2d at 1273. In such situations, requiring the law enforcement officers to obtain a warrant would unduly burden the police force and lead to the destruction of probative evidence that could

be used against individuals for which there is probable cause for an arrest. See Zabare, 871 F.2d at 292; Aquino, 836 F.2d at 1273.

The testimony at trial was undisputed that the defendants had substantial experience prior to December 2006 interviewing gang members and using that information to recover illegal guns. The gang members were known to carry illegal guns and use illegal guns in the course of the commission of crime. Hartford was identified as the 7th most dangerous City in the United States as of 2005, and in excess of 60 illegal guns had been recovered during the previous year. The evidence was undisputed that the defendants knew George Hemmingway to be a high ranking member of the West Hell gang; that Hemmingway was recently in prison on a gun charge; that Hemmingway was recently released on parole; that Hemmingway was found in possession of heroin on December 20, 2006; that Hemmingway sought to help himself by offering to produce illegal guns to the arresting officers; that Hemmingway not only had motive to try to help himself by producing 2 illegal guns, but also had motive not to mislead the police officers about the existence and whereabouts of illegal guns; that Hemmingway, after indicating he would produce two illegal guns, made a call on a cell phone; that after completing the cell phone call, Hemmingway reported to Officer Laureano that the guns were behind 297 Enfield St, in an abandoned car, color- gray, make- Nissan, model- Maxima, location-beneath front seat, and a particularized description of what would be found—2 small caliber handguns.

The defendants testified they did not know whether the guns were already inside the Maxima, or were being brought there. Defendants also testified that guns move quickly in their experience, and they did not expect the 2 guns referred to by Hemmingway to be in the Maxima for long, as they could be removed by another gang member, removed by a person who saw the gang member place the guns in the Maxima, or found accidentally by someone from the

neighborhood. The layout of the yard is clear from the photographs introduced at trial. The layout of the yard at 297 Enfield St was surrounded by private property on 3 sides, and could not easily be cordoned off while a warrant was sought to search for an abandoned car with guns. Certainly the intrusion associated with a cordoning off of the plaintiffs property would be far greater than the quick entry along the north side of the plaintiffs house for look at the rear yard at 297 Enfield St.

Based on the totality of circumstances, a reasonable police officer could conclude that probable cause and exigent circumstances existed that justified the entry onto the plaintiff's property to search for illegal guns. Even if this court finds to the contrary, reasonable police officers could be mistaken as to the applicability of the exigent circumstances exception to the warrant requirement under the circumstances, which entitles the defendants to qualified immunity on that basis.

III. Reasonable Police Officers Could Disagree on Whether the Community Caretaker exception to the Warrant Requirement Applied, and Justified Entry onto the Plaintiffs Property.

A. The Community Caretaker Exception to the Warrant Requirement

The Supreme Court of the United States recognized a "community caretaker" exception to the warrant requirement of the Fourth Amendment in Cady v. Dombrowski, 413 U.S. 433 (1973). In that case, officers detained a police officer from another state who had gotten into a car accident and was suspected of drinking. Id. at 436. The defendant did not have his police revolver on him when he was detained, thus prompting the arresting officers to search his vehicle for this revolver based on the rationale that the gun may pose a threat to public safety if it were taken from by a third party. Id. The Court held that the officer's warrantless search of the vehicle was permitted because the officers were seeking to protect the public, rather than obtain

evidence as part of a criminal investigation. Id. at 448. The rationale underlying the community caretaker exception is that in particular situations warrantless searches must be conducted in order to protect the lives and property of citizens. United States v. Markland, 635 F.2d 174, 176 (2nd. Cir. 1980).

1. The Officers' Conduct Must be Objectively Reasonable

The Supreme Court of the United States did not dictate a specific analysis for determining when the community caretaker exception applies, but jurisdictions have held that the analysis is analogous to those of other exceptions to the warrant requirement in that, based on the totality of the circumstances, the officer's conduct must have been objectively reasonable. State v. Witczak, 23 A.3d 416, 425.(N.J. Super. Ct. App. Div.2011); State v. Pinkard, 785 N.W.2d 592, 598-99 (Wis. 2010). What sets the community caretaker doctrine apart from other exceptions to the warrant requirement is that the officers' justification for warrantless entry based on the community caretaker exception does not need to meet the threshold of probable cause. United States v. Quezada, 448 F.3d 1005, 1007 (8th Cir. 2006). Rather, the officers must have some articulable facts that, taken with rational inferences, reasonably warrant the officer's intrusion. State v. Deneui, 775 N.W.2d 221, 239 (S.D. 2009). Requiring that officers act reasonably is an inherently malleable standard and courts have not been specific with what constitutes reasonable conduct. See id. at 236-39. One court has held that an officer's conduct is reasonable when the public interest or need that is furthered by the officer's conduct outweighs the degree and nature of the intrusion on the citizen's constitutional interest. Pinkard, 785 N.W.2d at 605. That court stated, "The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." Id.

2. The Officers Must be Acting in their Community Caretaking Capacity

In addition to being objectively reasonable, the community caretaker exception to the warrant requirement will apply only when the officer's conduct is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady, 413 U.S. at 441. The rationale underlying this requirement is that a warrantless search or seizure is justifiable under the community caretaker exception because the officers are acting to ensure the safety and welfare of the citizenry at large, rather than obtain evidence for use in a criminal investigation, and thus the intrusion on individual privacy is less severe. People v. Davis, 497 N.W.2d 910, 920 (Mich. 1993); Witczak, 23 A.3d at 425. It follows from this that there can be no police pretext or bad faith in order for the community caretaker exception to apply. United States v. Gillespie, 332 F. Supp. 2d 923, 929 (W.D. Va. 2004); see Markland, 635 F.2d at 176 (finding significance in the fact that the police officer's conduct was not a subterfuge for a criminal investigation). Courts are split on the issue of whether the officer's subjective motives may inform this determination. Deneui, 775 N.W.2d at 238 (recognizing that the Eighth Circuit has made clear that an officer's subjective motivation is irrelevant to a determination of whether the warrantless entry was justified). But see Pinkard, 785 N.W.2d at 602-03 (recognizing that a court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker...). Courts have held that an officer may serve a dual function, acting both in his or her capacity to ensure public safety as well as conduct a criminal investigation. Witczak, 23 A.3d at 422-23; Pinkard, 785 N.W.2d at 602-03; see Deneui, 775 N.W.2d at 243-244 (holding that the community caretaker exception applied where officers initially were investigating a theft at a home but that the investigation matured into a

community caretaking concern when the officers smelled ammonia emanating from the home and believed someone may be injured from the chemical). The court in Witczak stated:

We also agree...that “[t]o hold that the police can never legitimately engage in community caretaking activities merely because they are also involved in the detection, investigation, or acquisition of evidence concerning the violation of a criminal statute could lead to absurd results.” We will not read Cady in a way that would handcuff police officers from fulfilling a clear community caretaking responsibility ... merely because the officers are engaged in a concurrent criminal investigation.
23 A.3d at 422.

Furthermore, the Supreme Court of the United States recognized in Cady that it is not necessary that all conceivable alternatives be exhausted before a warrantless entry based on the community caretaker exception will be permissible. 413 U.S. at 447; United States v. Rohrig, 93 F.3d 1506, 1525 (6th Cir. 1996).

3. Policy Considerations Regarding the Community Caretaker Exception to the Warrant Requirement

In many situations, it may be unclear to a police officer whether the circumstances justify a warrantless entry based on the community caretaker exception to the warrant requirement. Many courts have acknowledged that police officers are not only permitted, but expected, to exercise what the Supreme Court has termed “community caretaking functions.” Deneui, 775 N.W.2d at 242. Modern society has come to see the role of police officers as more than basic functionaries enforcing the law. Id. Lives often depend upon officers’ quick exercise of pragmatic wisdom. Id. “Constitutional guarantees of privacy and sanctions against officers’ transgressions do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life.” Id. In Deneui, officers entered a home without a warrant because ammonia was emanating from the house and the officers believed someone inside may be harmed by the odor. Id. at 227. The court in that case stated:

Although we cannot term the circumstances here an indisputable emergency, given the known facts, prudent and reasonable police officers would have reasonably perceived a need to act in the proper discharge of their community caretaking functions. The touchstone of analysis under the Fourth Amendment is ... reasonableness in all the circumstances.... We think it was objectively reasonable under the particular circumstances of this case for the officers to be concerned about the possible dangers of ammonia fumes....
Id. at 242.

Furthermore, courts should pay deference to the actions of trained law enforcement officers and avoid using the benefit of hindsight to second guess their assessment of the circumstances that they faced. Gillespie, 332 F. Supp. 2d at 927.

4. Applicability of the Community Caretaker Exception to Warrantless Entry Into the Home/Curtilage

The Supreme Court of the United States was careful in Cady to draw the distinction between the circumstances of that case—the warrantless search of a vehicle—from warrantless searches of areas with heightened expectations of privacy, such as the home, on which it did not express an opinion. 413 U.S. at 441. The Court emphasized that the Fourth Amendment is based on reasonableness and thus, circumstances that would reasonably allow a warrantless search of a car may not necessarily justify a warrantless search of a home. Id. Courts have interpreted this language differently, some holding that the community caretaker exception may not justify a warrantless entry into a home and others holding that the community caretaker exception could justify a warrantless entry into the home provided such entry was reasonable based on the circumstances and divorced from criminal investigation. See Witczak, 23 A.3d at 424. The Third, Seventh, Ninth, and Tenth Circuits have interpreted Cady not to permit the community caretaker exception to justify a warrantless search of a home. Id. The Fifth, Sixth, and Eighth Circuits have allowed the community caretaker exception to be applied to warrantless entry into a home. Id. In Pinkard, the court stated, “[w]e read Cady not as prohibiting officers

from entering a residence without a warrant...but instead as counseling a cautious approach when the exception is invoked to justify law enforcement intrusion into a home.” 785 N.W.2d at 598.

The Second Circuit Court of Appeals has recognized the community caretaker exception to the warrant requirement, however it has never ruled on the applicability of that exception to a warrantless entry into a home or curtilage. See United States v. Miner, 956 F.2d 397, 397-99 (1992) (holding that police officer called to investigate the vandalism of a motor vehicle, and prepare a report for insurance purposes, was acting in his community caretaking capacity when he searched an open cardboard box in the interior of the truck); Markland, 635 F.2d at 176-77 (holding that the community caretaker exception applied to the warrantless search of a container in a vehicle that was involved in a car accident because an officer could reasonably believe a search of such containers was necessary to ensure they did not contain a bomb or perishable items).

The decisions of several courts that have ruled on the applicability of the community caretaker exception to a warrantless entry into the home are summarized below.

In United States v. Quezada, a police officer sought to serve defendant with papers unrelated to a criminal investigation of the defendant. 448 F.3d at 1006. The officer knocked on the door to defendant’s apartment and it opened slightly, allowing the officer to see that the television and lights were on in the apartment. Id. After yelling “Deputy Sheriff, Sheriff’s Department” several times and receiving no response the officer notified the dispatcher and entered the apartment. Id. Upon entering, the officer saw two legs sticking out from a doorway down a hallway. Id. The officer approached the man and saw that he was lying on a shotgun. Id. Later, the officer determined that the man was a convicted felon and was in unlawful

possession of the firearm. Id. at 1007. The defendant's motion to suppress the evidence of the firearm as the fruit of an unlawful search was denied. Id. The court found that the officer entered the apartment acting in his community caretaking capacity. Id. at 1008. The court found it reasonable to believe that someone was home and may be in need of assistance where the apartment door was unlocked, the television and lights were on, and the officer received no response to his announcement. Id. Thus, the weapon seen under the defendant was admissible evidence under the plain view doctrine. Id.

In United States v. Rohrig, two police officers received a complaint of loud music emanating from the defendant's residence very early in the morning. 98 F.3d at 1509. As the officers approached the residence, the music could be heard from a block away. Id. One officer used the end of his flashlight to bang repeatedly on the front door of the defendant's residence, but received no response. Id. The officer also banged on all of the windows on the first floor in an effort to alert the defendant. Id. Around the back of the defendant's home, one officer noticed that the main door was open, with only an unlocked screen door preventing access into the house. Id. The officers knocked and hollered to announce their presence, but again received no answer. Id. The officers entered the home, announcing their presence each time they approached a room. Id. All lights were off except the kitchen light, but while the officers were inside, they noticed a light coming from under a doorway. Id. The officers opened this door, which led to a basement, and went downstairs in hope of finding someone who could turn the music down. Id. at 1510. Instead what the officers found was a "wall-to-wall" marijuana growing operation with running water and fans. Id. The officers then proceeded to the second story of the home, where the defendant was found lying on the floor of a bedroom. Id. Defendant was woken, handcuffed, and eventually charged with possession of marijuana with

intent to distribute. Id. The court denied the defendant's motion to suppress the marijuana as the fruit of an illegal search. Id. at 1523. The court found that the officers were acting in their community caretaking capacity because they entered the home with the purpose to locate and abate a nuisance in order to restore the neighbors' peaceful enjoyment of their homes and neighborhood. Id. at 1521. Furthermore, the court found the officers' conduct to be reasonable because they initially tried to abate the nuisance by least intrusive means—knocking on the front door—before resorting to walking around the back of the house and eventually entering the house. Id. at 1524. Also, while they were in the house, they consistently announced their presence. Id.

In United States v. York, 895 F.2d 1026, 1027 (5th Cir. 1990), a police officer responded to a disturbance call. Upon arriving at the scene, he was met by a man named Bill and his two sons who had been staying as guests in the defendant's home. Id. The defendant was drunk and threatening the guests, so the guests called the police in order to allow the guests to remove their belongings from the home and prevent any potential altercation. Id. at 1027-28. While standing in the foyer of the home, the officer saw an Uzi machine gun and Thompson sub-machine gun in a glass fronted cabinet in the living room. Id. at 1028. Later the officer contacted the Federal Bureau of Alcohol, Tobacco and Firearms because he believed the weapons he saw were illegal. Id. Federal agents obtained a warrant to search the defendant's home based on the officer's report and seized the weapons. Id. Upon being convicted of the firearms charges, the defendant argues that the district court erred in refusing to suppress the evidence gained through the warrant based on the officer's report. Id. The court held that the police officers were acting to keep the peace rather than investigate any crime while the guests removed their belongings, and

thus, they were acting in a caretaking capacity and were lawfully standing in the foyer where they saw in plain view the illegal weapons. Id. at 1030.

In State v. Witczak, a police officer received a call concerning an alleged aggravated assault involving a gun. 23 A.3d at 419. He responded to the call and located the victim a couple blocks from the scene of the assault. Id. At the defendant's home, the officer observed the defendant at a third-floor window and told him to come outside. Id. The defendant exited and told the police officers that there was a gun upstairs. Id. The officer, now joined by at least eight other officers surrounded the house. Id. at 420. One officer decided to enter the home to retrieve the gun without first obtaining a warrant. Id. The defendant was charged with aggravated assault and sought to suppress the weapon as the fruit of an illegal entry into the home. Id. The trial court ruled that the circumstances justified the warrantless entry into the home, and thus the gun was not suppressed. Id. However, this ruling was overturned after an interlocutory appeal. Id. at 427. The New Jersey Supreme Court did not believe that the officer's entry into the home was objectively reasonable given the totality of the circumstances because the scene had been secured. But, the court did believe that under the right circumstances the community caretaker exception to the warrant requirement could justify warrantless entry into a home. Id. at 425.

In State v. Deneui, an employee of an energy company called the police to investigate the possible theft of electricity. 775 N.W.2d at 227. The police officer approached the home and saw that the storm door was shut but unlocked and that the main wooden door was wide open. Id. The officer smelled a faint odor of ammonia in the air. Id. The officer knocked on the door, but no one answered. Id. The officer then decided to open the storm door and yell inside, "Hello, Police. Anyone in here?" to which there was no response. Id. Upon opening the door,

the faint odor of ammonia became stronger. Id. at 228. The officer had experience with ammonia and knew that it could “knock somebody out.” Id. The officer decided to enter the residence in order to make sure no one was incapacitated. Id. The officer, joined by another officer, looked on the first floor and second floor of the home but did not find anyone, so they entered the basement where, in plain view, they saw evidence of a methamphetamine lab. Id. The defendant was arrested and charged with various drug charges. Id. at 228-29. The defendant’s motion to suppress the evidence obtained as a result of the officers’ entry into his home was denied and he was convicted of the drug charges. Id. at 229. On appeal, the court affirmed the trial court’s holding that the community caretaker exception applied to entry into the home. Id. at 244. The court found persuasive the fact that the door to the home was unlocked and open, which suggested that someone was home; that no one answered the door when the officers knocked and announced their presence; that ammonia was emanating from the home; and that the officers knew ammonia could have toxic effects on a person. Id. at 242.

In People v. Davis, police officers received a radio dispatch alerting them that there had been shots fired in either room 33 or 34 of a motel. 497 N.W.2d at 911. The two officers went to the motel to investigate, and entered room 33 first, allegedly because it was the first door they got to. Id. After knocking on the door for about five minutes, the defendant opened the door and the officers stepped just inside the room. Id. From this vantage point, one officer saw a handgun wedged between the mattresses as well as pharmaceutical capsules on the dresser table. Id. at 911-12. The other officer walked to the bathroom to see if a person was injured in it. Id. In the bathroom, the officer saw measuring spoons and narcotics in plastic bags on the sink. Id. The officers called a narcotics squad approximately thirty minutes later and the defendant was eventually arrested and charged with possession of the controlled substances and gun. Id. at 912-

13. At a suppression hearing, the trial court ruled that the officers' entry into the motel was illegal and the evidence seized be suppressed. Id. at 913. The court found significance in the fact that the officers abandoned their inquiry regarding the gun shots allegedly fired and never even searched the other motel room, thus indicating that they were not interested with ensuring public safety or providing care, but rather, in investigating the possession of the controlled substances. Id. 913. The Court of Appeals held that the trial court erred in suppressing the evidence, holding that the community caretaker exception to the warrant requirement permitted police officers to enter the motel room upon receiving the report that shots had been fired. Id. The Supreme Court of Michigan recognized that the community caretaker or emergency aid doctrine could allow warrantless entry into a dwelling, but held that neither exception to the warrant requirement was supported by adequate evidence. Id. at 922. The court emphasized the fact that the officer's did not hear the gunshots themselves and that there were inconsistencies in the call reporting the gunshots, including identifying the motel by an incorrect name. Id. at 921-22.

In State v. Pinkard, a police officer received an anonymous tip from an individual who said he was just at defendant's residence and that there was cocaine, money and a scale in the residence and the back door was wide open. 785 N.W.2d at 594-95. The officer relayed this information to the department's Gang Crimes Unit and further stated that he was concerned about the occupants of the residence. Id. at 595. Five officers from the Gang Crimes Unit went to the defendant's residence "to check the welfare of the occupants." Id. The officers announced their presence at the open back door but received no response. Id. After about a minute the officers entered the defendant's residence to "make sure that the occupants that the caller had referred us were not the victims of any type of crime; that they weren't injured; that they weren't

the victims of like a home invasion, robbery; that they were okay, and to safeguard any life or property in the residence.” Id. From just inside the door, the officers could see into the bedroom where the defendant and one other person appeared to be sleeping. Id. The officers entered the room just to see if they could awake the occupants, and again loudly announced themselves. Id. The officers had to shake the defendant to wake him. Id. Inside the bedroom, in plain view, the officers saw cocaine, crack cocaine, marijuana, and a digital scale. Id. The defendant was arrested and charged with possession of a controlled substance, among other things and was eventually convicted. Id. The trial court credited the officers’ testimony, that they entered the residence to inquire as to the health and safety of the individuals that were sleeping rather than to conduct a criminal investigation. Id. The court of appeals affirmed the ruling, finding that there were sufficient facts to support an objectively reasonable basis to engage in a community caretaker function, despite the fact that there was also potential to exercise law enforcement functions during the inquiry. Id. at 596. This decision was affirmed by the Supreme Court of Wisconsin, finding that the community caretaker exception permitted warrantless entry into a residence and applied a three part test, focusing on: the existence of a search, the officers’ bona fide caretaking function, and the balance of the public interest in the conduct against the degree of the intrusion; to determine that the officers’ entry under these circumstances was justified. Id. at 601, 608.

In United States v. Gillespie, a police officer went to the defendant’s apartment to serve a warrant for a capias for failing to appear in court to answer a charge for driving with a suspended license. 332 F. Supp. 2d at 925. The officer observed the peephole on the door get dark and then light again, as if someone looked through it. Id. The officer knocked several times then walked around back and looked up at the second story balcony. Id. At this point another officer arrived

and the officers were told by another resident that the defendant had two young children. Id. at 926. After knocking again at the front door, the officers noticed fresh footprints in the snow around back, as if someone had jumped off of the second story balcony. Id. At some point they heard a child crying but could not tell if it was coming from the defendant's apartment. Id. The officers contacted the defendant's son-in-law to open the door for them, and upon doing this, the officers heard no child crying in the apartment. Id. However, they did see in plain view two bullet proof vests in the living room and several firearms and digital scales in the bedroom. Id. When the defendant returned home she was arrested for possession charges. Id. The defendant sought to suppress the evidence as the fruit of an illegal entry into her home and the court granted the defendant's motion. Id. at 925. The district court recognized that the community caretaker exception to the warrant requirement could justify a warrantless entry into a home, but found that the particular circumstances of this case did not justify such an entry. Id. at 930. The district court found significance in the fact that the officers were investigating the potential criminal activity of the individuals who jumped off the second story balcony and that the concern for the children's welfare was merely pretext to enter the apartment. Id.

In Bies v. State, 251 N.W.2d 461, 463 (Wis. 1977), a police officer received a radio message directing him to investigate a noise complaint near the defendant's garage. Id. The garage was located on the curtilage of the defendant's dwelling. Id. at 464. The officer walked around the garage and saw in plain view through the open rear doorway what he believed was a stolen telephone cable. Id. at 463. Without permission or a warrant, the officer seized the cable from inside the garage. Id. at 464. The court held that "[c]hecking noise complaints bears little in common with investigate of crime.... The officer was clearly justified in proceeding to the

alley in question and conducting a general surveillance of the area to determine whether some noise or other disturbance was present.” Id. at 468.

The testimony was undisputed at trial that the Defendants entered the Plaintiff’s property for the purpose of securing two illegal and unsecured handguns, which were loose in the community and at the disposal of gang members. There was no evidence of an intention to use the guns as evidence of a crime or to build a case against anyone. The fund of information the defendants had, as recited above, certainly meets the threshold applicable to the Community Caretaker exception to the warrant requirement. Even if this court concludes it did not, a reasonable police officer could have been mistaken as to whether the Community Caretaker exception to the warrant applied to the facts and circumstances confronting Defendants O’Hare and Pia on December 20, 2006. Accordingly, the defendants are protected by qualified immunity.

IV. Conclusion

For the reasons set forth above judgment should enter for the Defendants, as a matter of law, based on qualified immunity.

DEFENDANTS,
JOHNMICHAEL O’HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde
ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on June 21, 2012, a copy of the foregoing Memorandum in Support of Renewed Motion for Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Thomas R. Gerarde
Thomas R. Gerarde

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually, and P.P.A.	:	CIVIL ACTION NO. 3:08CV1644(RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs,	:	
V.	:	
	:	
	:	
JOHNMICHAEL O'HARE;	:	
ANTHONY PIA; and	:	
CITY OF HARTFORD,	:	
Defendants.	:	JUNE 26, 2012

**PLAINTIFF'S MOTION FOR JUDGMENT
AS A MATTER OF LAW AND MOTION FOR NEW TRIAL**

Pursuant to Fed. R. Civ. P. 50(b), the plaintiff, Glen Harris, individually and on behalf of his minor daughter, K. (collectively "plaintiff"), moves for judgment as a matter of law notwithstanding the jury verdict. The plaintiff moves additionally and/or alternatively, and pursuant to Fed. R. Civ. P. 59, for a new trial. At the close of the evidence on or about May 24, 2012, the plaintiff moved for judgment in part as a matter of law pursuant to Fed. R. Civ. P. 50. The Court thereafter reserved judgment and submitted the case to the jury. [Doc. 103]. A memorandum of law accompanies the instant motion.

WHEREFORE, the plaintiff requests that the court grant the instant motion.

Oral argument hereupon is requested.

THE PLAINTIFF—GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (Fed Bar #ct00119)

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Post Trial Matters\motion for new trial 50 & 59.wpd

JON L. SCHOENHORN & ASSOCIATES, LLC

ATTORNEYS AT LAW

108 OAK STREET ■ HARTFORD, CT 06106-1514 ■ TEL. (860) 278-3500 ■ JURIS NO. 406505 ■ FEDERAL BAR NO. ct 00119

misapplication of the court's instructions, or other error, the verdict constitutes a miscarriage of justice, requiring that the remaining portions be set aside as well.

I. LEGAL STANDARDS FOR JUDGMENT AS A MATTER OF LAW NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

Pursuant to Fed. R. Civ. P. 50(b), a court may grant a motion for judgment as a matter of law notwithstanding the verdict when (1) there is “such a complete absence of evidence supporting the verdict that the jury's findings could only have resulted from sheer surmise and conjecture,” or (2) there is such an “overwhelming amount of evidence in favor of the movant that reasonable and fair minded” people could not have reached a verdict against the moving party. *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir.1993) (citing *Mattivi v. South African Marine Corp.*, “*Hugenot*,” 618 F.2d 163, 168 (2d Cir. 1980)). Notably, the court “must consider all [of] the evidence in a light most favorable to the non-mover, must draw reasonable inferences favorable to the non-mover, and must not substitute its choice for that of the jury between conflicting elements in the evidence.” *Ortho Diagnostic Systems, Inc. v. Miles Inc.*, 865 F. Supp. 1073, 1078 (S.D.N.Y.1994), appeal dismissed, 48 F.3d 1237 (Fed. Cir.1995). In addition, the court cannot “pass on the credibility of the witnesses” *Samuels*, 992 F.2d at 11-12 (citing *Mattivi*, 618 F.2d at 167). Thus, a motion for judgment notwithstanding the verdict should be granted when the evidence, viewed in the light most favorable to the non-movants, reasonably permits only a conclusion in the movant's favor.

Under Fed. R. Civ. P. 50(b), a motion for judgment as a matter of law may be joined by a motion for a new trial under Rule 59. Fed. R. Civ. P. 59 permits the district court to grant a new trial on all or some of the issues “after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). The decision whether or not to grant a new trial “on the ground that the verdict was against the weight of the evidence is committed to the sound discretion of the trial judge.” *Metromedia Co. v.*

Fugazy, 983 F.2d 350, 363 (2d Cir. 1992), cert. denied, 508 U.S. 952 (1993), abrogated on other grounds, *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). A motion for a new trial ordinarily should be granted only in instances in which the jury's verdict can be seen as "seriously erroneous" or the verdict is a "miscarriage of justice." *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998) (quoting *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir. 1997) (internal citations omitted)); see also *Piesco v. Koch*, 12 F.3d 332, 344 (2d Cir. 1993); and *Purnell v. Lord*, 952 F.2d 679, 686 (2d Cir. 1992). This is just such a case.

II. THE WARRANTLESS ENTRY AND SEARCH OF THE PLAINTIFF'S PROPERTY VIOLATED THE FEDERAL PROHIBITIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

A. The Defendants Possessed No Probable Cause to Search

The fourth amendment requires that a search warrant be issued by a neutral and detached magistrate and find that probable cause exists to believe (1) that a crime has been committed and (2) there was evidence of a crime at a particular place to be searched. *United States v. Trivisano*, 724 F.2d 341, 346 (2d Cir. 1983). Requiring a showing of probable cause to search here represents the minimum for individual liberty. "To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Here, there was no probable cause and the plaintiff is a victim of "whimsy." There isn't even "arguable probable cause." See *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

The collective knowledge of the defendants on December 20, 2006 when they entered the plaintiffs' yard is derived exclusively from a "tip" conveyed by their fellow officer and O'Hare's "partner," Laureano. It is set forth not only in the testimony of Laureano but in various reports, some sworn, and at least one of which contains a "warrant cover sheet" signed by O'Hare.¹ Both

¹ In Plaintiff's Exhibit 34, Laureano erroneously and I submit *falsely* refers to Hemingway as a "concerned citizen." Under long-standing Connecticut jurisprudence, the

Pia and O'Hare admitted they heard none of the "tip" themselves. In *toto*, the tip consisted of a verbal claim by one George Hemingway that there were two guns allegedly stashed in an abandoned Nissan Maxima in the back yard of 297 Enfield Street. Of course, Hemingway, a paroled felon, was at that moment allegedly under arrest for narcotics trafficking after supposedly dropping heroin right in front of the officers. He refused to tell Laureano how he learned of this "tip." Instead of either taking Mr. Hemingway into custody or even reporting the arrest, he was driven to his home and then released. That Pia and O'Hare thought Laureano related more than he did is irrelevant, since "collective knowledge" is based solely on the actual information related; not a mistaken understanding of it. The Supreme Court has been very clear about this precept in the context of arrest, which, of course, utilizes the same quantum of evidence as probable cause for a search:

Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

Whiteley v. Warden, 401 U.S. 560, 568 (1971) (fourth amendment probable cause requirements

credibility of so-called "citizen informers" in probable cause determinations is "bolstered by the fact that citizen informers are considered more credible than confidential informants who are often criminals themselves with ulterior motives for providing information to the police." *State v. Anziano*, 26 Conn. App. 667, 673 (1992). Obviously, this does not apply to Hemingway – a common criminal – or to his "tip" in the remotest fashion. Citizen informants who are not criminals in search of leniency generally are presumed to be telling the truth, unless there are reasons to suggest "that they should not be trusted." *United States v. Elmore*, 482 F.3d 172, 180 (2d Cir. 2007). There was no basis whatsoever to trust this convicted felon and gang member, since he told Laureano that he could not or would not state the source of his information. The astonishing level of ignorance of these officers as to standards for both probable cause, informants and the fourth amendment does not provide a basis for the jury's erroneous conclusion. Indeed, the incorrect recitation of the probable cause standards by these officers obviously confused and misled this jury.

same for both arrest and search warrants). *See, also, Arizona v. Evans*, 514 U.S. 1, 13 (1995) (affirming *Whiteley* analysis for fourth amendment violations while eschewing its automatic application to the exclusionary rule in criminal cases).

Thus, just because Pia or O'Hare say they had probable cause, and erroneously thought that Laureano conveyed more information about the tip than he, in fact, did, does not excuse their unlawful behavior. As succinctly stated by the Fourth Circuit in *Rogers v. Pendleton*, 249 F.3d 279 (4th Cir. 2001), in affirming a verdict against police officers after they arrested a homeowner in his backyard without a warrant: "Officers are not afforded protection when they are 'plainly incompetent or . . . knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The defendants received information second hand, exclusively from what Laureano told them. Laureano, in turn, told the defendants that George Hemingway, a known criminal, then under arrest for narcotics trafficking, claimed there were two guns stashed in a vehicle in the rear of 297 Enfield Street, but he refused to say how he learned about the alleged existence of these firearms. Hemingway was not a reliable informant, despite the outrageous testimony from the defendants about their own "understanding" that a convicted felon under arrest for narcotics trafficking is more "reliable" than most people because he is a gang member. This testimony deserved no weight whatsoever, not only because it was contrary to the law and the supposed training of these officers, but contradicted the court's instructions to the jury regarding probable cause. *See, Illinois v. Gates*, 462 U.S. 213 (1983). The testimony is as baseless as the claim that a "concerned citizen" is a criminal who is "concerned" about his own imminent incarceration and happens to be a "citizen" of the community. *See* footnote 1, *supra*.

Regardless of the apparent ignorance of these defendants regarding the meaning of probable cause or the use of informants, they did nothing to corroborate a single detail of the

“tip.” When the defendants arrived at 297 Enfield Street, they claimed they saw no vehicle at all on the property. Indeed, they claimed they could not even drive around the block in an effort to corroborate whether a vehicle was present. This, alone, precludes consideration of the reliability of the uncorroborated “tip” as reasonable, and signaled to the defendants that there was no probable cause and, therefore, they needed to reconsider their approach. It also demonstrates that there is no dispute that the defendants utterly lacked probable cause, and that any reasonable attempt to obtain a warrant would have been met with a resounding “NO.”

B. A Warrant Was Required

When Defendants O’Hare and Pia went through the plaintiff’s gate and veered from the front walkway that led to the front door of the dwelling, and instead crossed the lawn and entered the fenced-in side yard to the north and then made their way to the backyard to search for guns stashed in a non-existent abandoned Nissan Maxima, they already violated the fourth amendment. There was no probable cause for the “tip,” there was no lawful basis to engage in this search without a warrant, and there was no exception to the warrant requirement. Because the officers’ entry into the enclosed side yard, as well as their entry into the backyard (even for a short distance) was uninvited and inside what was undisputed to be the plaintiff’s protected curtilage, it automatically was an illegal entry in violation of the Fourth Amendment prohibition against unreasonable searches and seizures, entitling the plaintiffs to judgment as a matter of law.

The Fourth Amendment explicitly provides for the right of the people “to be secure in their persons, houses, and [possessions or effects]” from “unreasonable searches and seizures.” Furthermore, the provision further requires that warrants issue only upon probable cause supported by oath or affirmation. The warrant requirement has special application where the place to be searched is a person’s home. It is a basic tenet and perhaps one of the most fundamental notions in our society that a person’s home is the equivalent of his castle. *See,*

Payton v. New York, 445 U.S. 573, 585 (1980) (“physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”). The warrant requirement ensures that this fundamental right to be secure in one’s home is jealously guarded. The United States Supreme Court has long recognized this doctrine:

The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 14 (1948). (Internal quotation marks omitted); *State v. Geisler*, 222 Conn. 672, 691 (1992).

“[A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). This warrant requirement is well-established and ensures that any exceptions to this fundamental right to be secure in one’s home be “jealously guarded and carefully drawn.” *Jones v. United States*, 357 U.S. 493, 499 (1958). The warrant requirement has special application where the place to be searched is a person’s home. Consequently, where law enforcement officers seek to enter private property to conduct a search, they must first obtain a warrant. The Supreme Court, recognizing this long-standing doctrine, stated long ago that, “[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.” *Johnson v. United States*, *supra*, 333 U.S. at 14.

In *Payton*, *supra*, the Court noted that the common-law tradition at the time of the drafting of the Fourth Amendment was ambivalent on the question of whether law enforcement officials could enter a home without a warrant even to make an arrest. The court ultimately was

persuaded that the “overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic” meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest. *Id.* at 603-604. This “heightened privacy interest afforded to a dwelling place extends to the curtilage, which has been described as an area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life.” *United States v. Hayes*, 551 F.3d 138, 145-46 (2d. Cir. 2008), *quoting Oliver, supra*, 466 U.S. at 180. Thus, any illegal entry into a home’s curtilage is equivalent to an illegal entry into the home itself.

C. The Exigency Exception to the Warrant Requirement Did Not Apply

Exceptions to this rule – such as “exigent circumstances” – are narrowly-delineated and carefully circumscribed. The Supreme Court emphasizes that exceptions to the warrant requirement are “‘few in number and carefully delineated,’ and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.” *Id.*, at 749-50. For example, a police officer may enter a house with a warrant when in hot pursuit, which is a form of exigent circumstances. *See Ker v. California*, 374 U.S. 23 (1963) (warrantless and unannounced entry of private dwelling by police permissible to prevent destruction of evidence). However, there must be a “compelling need for official action and no time to secure a warrant.” *Warden v. Hayden*, 387 U.S. 294 (1967). “Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency.” *Kentucky v. King, supra*, 131 S. Ct. 1849, 1862 (2011), *citing Brigham City v. Stuart*, 547 U.S. 398, 406 (2006). However, “the exigent circumstances rule applies when the police *do not* gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” *Kentucky v. King*, 131 S. Ct. at 1862.

Consistent with this principle, police officers need either a warrant or probable cause *plus*

exigent circumstances in order to make a lawful entry into a home. *See Loria v. Gorman*, 306 F.3d 1271, 1283 (2d Cir. 2002); *Hudman v. Rice*, 927 F.2d 74, 79 (2d Cir. 1991) (police claim of right to enter in the absence of exigent circumstances was “doctrinally unsound”). “Absent exigent circumstances, the firm line at the entrance to the house may not be reasonably crossed without a warrant.” *Kirk v. Louisiana*, 536 U.S. 635, 636 (2002). When determining whether exigent circumstances justify a warrantless entry, the key question is whether the law enforcement agents were confronted by an urgent need to render aid or to take action. *United States v. McDonald*, 916 F.2d 766, 769 (2d Cir. 1990).

“[T]he determination of exigent circumstances *vel non* necessarily turns upon whether in light of all the facts and circumstances of the particular case there was an 'urgent need' that 'justified' a warrantless entry. . . . The issue this Court must resolve is whether it was objectively reasonable to conclude on the basis of these few facts that . . . the destruction of evidence [was] imminent” *United States v. Zabare*, 871 F.2d 282, 290 (2d Cir 1989). “[T]he test for determining whether a warrantless entry was justified by the presence of exigent circumstances is an objective one.” *Id.* at 291. When exigency is claimed for a search of premises for evidence, courts particularly are focused on the police officers’ objective belief that incriminating evidence will be destroyed or transferred before a search warrant can be obtained. *See, e.g. United States v. MacDonald*, 916 F.2d 766, 769 (2d. Cir. 1990); *United States v. Atherton*, 936 F.2d 728, 732 (2d. Cir. 1991); *United States v. Schaper*, 903 F.2d 891, 894- 95 (2d Cir.1990). The court must look at the evidence pertaining to whether some kind of exigency or emergency existed to justify the officers’ otherwise blatantly unconstitutional intrusion. “[T]he emergency doctrine does not give the [police] an unrestricted invitation to enter the home. . . . The police, in order to avail themselves of this exception, must ‘have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings’” *State v.*

Geisler, 222 Conn. 672, 691-92 (1992). This is an objective – not subjective – test. It is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed. *See United States v. Zabare*, 871 F.2d at 291 (test for determining whether warrantless entry justified by exigent circumstances is an objective one).

At the outset, the defendants’ entire premise is flawed since “the mere presence of firearms does not create exigent circumstances.” *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994). “A warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.” *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (gathering cases); quoting *Payton*, 445 U.S., at 587-88. Moreover, as Judge Gleeson aptly stated in *United States v. Simmons*, 2003 U.S. Dist. LEXIS 652, at *29 (E.D.N.Y. 2003): “There is virtually no support for the government’s statement that exigent circumstances exist where a firearm is present in the premises to be searched, and/ or where there is some minimal evidence that the firearm’s presence constitutes a danger to executing officers based on information known about the premises’ occupants.” *Id.* (internal quotations omitted). Other courts uniformly have made similar statements, even when a warrant is first obtained. *Youngbey v. March*, 676 F.3d 1114, 1127-28 (DC Cir. 2012); *United States v. Moore*, 91 F.3d 96, 98 (10th Cir. 1996); *United States v. Marts*, 986 F.2d 1216, 1218 (8th Cir. 1993); *United States v. Gooch*, 6 F.3d 673, 680 (9th Cir. 1993). To borrow from common political rhetoric by those opposing gun control, “guns don’t kill; people do.”

On this point, this court instructed the jury as follows:

Under the exception to the warrant requirement for ‘exigent circumstances,’ conducting a warrantless search for contraband or evidence of a crime is justified if the police reasonably believe that unless they immediately conduct a warrantless search, the items in question will be removed or destroyed. A mere possibility

that such items could be removed or destroyed is not sufficient. Rather, for the exigent circumstances exception to apply, the officers must be justified in reasonably believing that the items are in the process of being removed or destroyed or that removal or destruction is imminent.

Thus, the jury's finding of exigency was without basis.

Here, the question whether the warrantless search of the plaintiffs' property was reasonable and, hence, constitutional must be answered no. *Kyllo v. United States*, 533 U.S. 27 (2001). Despite the jury's contrary finding, there was no reasonable possibility that exigent circumstances existed here. The jury's finding constitutes a manifest injustice, and the issue should never have been presented as an "exception" to the warrant requirement.

As the Connecticut Supreme Court has noted, without ploughing new constitutional ground, the officers must produce "direct evidence of an emergency situation" *State v. Colon*, 272 Conn. 106, 147 (2004), cert. denied, 546 U.S. 848 (2005). In other words, the defendants must "know some facts at the time of entry that would lead them to reasonably conclude that they could dispense with the necessity of obtaining a warrant supported by probable cause in accordance with the dictates of the fourth amendment." *State v. Ryder*, 301 Conn. 810 (2011). There is not a scintilla of evidence that any person physically was gaining access to remove or destroy these non-existent fictitious guns from a non-existent Nissan Maxima in the plaintiffs' yard on December 20, 2006. Indeed, the defendants were adamant that they saw no one (including 12-year-old K.) on the property. Of course, they admit that they did not bother with any constitutional "niceties" such as corroborating the "tip," knocking on the door to announce their purpose, seeking to obtain a search warrant, or securing the premises. Therefore, it was unreasonable as a matter of law to find that an emergency existed that permitted these defendants to invade the privacy of the plaintiffs without a warrant and with guns drawn. The jury clearly disregarded the court's instructions on exigency (which plaintiffs argued should not have been given in the first place), and decided the matter on some improper basis, such as

prejudice, emotion or outside influence, rather than on the evidence.²

Moreover, there was no reason why these officers failed to availed themselves of an opportunity to secure the premises and seek a warrant, which was an absolute prerequisite before choosing to enter without permission.³ In *Trupiano v. United States*, 334 U.S. 699 (1948), for example, agents seized an “illicit distillery” during a raid that led to the arrest of an individual. Although the arrest was deemed valid, the Supreme Court made clear that the failure of the agents to procure a search warrant – in spite of the fact that they had more than enough time before the raid to do so – rendered the search unlawful. *Id.* at 702. As the *Trupiano* Court clearly noted:

It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

Id. at 705.

Here, the police had no lawful basis to enter the plaintiffs’ property without first seeking

² While the plaintiff acknowledges that he retains the burden of proving his claim that the warrantless entry, search and subsequent seizure ultimately were “unreasonable” in light of the presumption against warrantless searches, the defendants still must produce sufficient evidence that an exception to the warrant requirement, such as “exigency,” applies. As the Court in *Tirremo v. Mott*, 375 Fed. Appx. 140 (2d Cir. April 30, 2010) acknowledged, to the extent Second Circuit precedent is unclear about who has the burden in a civil case of proving an exception to a warrantless search, “the presumption of unreasonableness applicable to warrantless searches . . . imposes only a burden of production, i.e. ‘the duty of producing evidence of [exigency].’” *Id.* at 142 (affirming this district court’s decision at 453 F.Supp.2d 562 (D. Conn. 2006)). But see, *Anobile v. Pelligrino*, 303 F.3d 107, 124-25 (2d Cir. 2002) (rejecting as matter of law defendants’ claim of implied consent as an exception to warrant requirement).

³ Of course no reasonable jurist would find probable cause for a search warrant on these facts or on the “tip,” which likely is why the defendants didn’t bother to do so.

permission. There was no evidence whatsoever that they needed to eschew the constitutional requirement of knocking and announcing the purpose of their entry, even if armed with a search warrant. *See Hudson v. Michigan*, 547 U.S. 586 (2006); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). Their purposes “have been expressed to be (1) the reduction of potential for violence to both the police officer and the occupants of the house . . . ; (2) the needless destruction of private property; and (3) a recognition of the individual’s right to privacy in his house.” *United States v. Brown*, 52 F.3d 415, 421 (2d Cir. 1995). This case provides a clarion example of all three types of harm that occurs when police disregard the law and sneak onto private property. Non-compliance with the “knock and announce” requirement only can be “excused by exigent circumstances.” *United States v. Spinelli*, 848 F.2d 26, 28 (2d Cir. 1988). Moreover, the fact that a jury of citizens was fooled by a subjective claim of exigency or, for that matter, may have been swayed by misleading irrelevancies about Hartford being the seventh most dangerous city in the country,⁴ demonstrates that a manifest injustice occurred here.

The instances in which law enforcement officials may enter a person’s home without a warrant are narrowly-delineated and carefully circumscribed. For example, as far as the allegations and claims in this particular case are concerned, Pia and O’Hare only could rely on claimed exigent circumstances if there was a likelihood of *imminent destruction* of evidence for which they had probable cause to believe existed. *See Kentucky v. King, supra*, 131 S. Ct. at 1856-57) (after smelling marijuana in common hallway and then knocking on apartment door and announcing their presence, police heard sounds consistent with the destruction of evidence);

⁴ The defendants were allowed over objection to state their belief about how dangerous Hartford was, and defense counsel used this questionable statistic about Hartford in his closing argument. This “fact” is erroneous in any event. In 2006, Hartford was listed as the 337th “safest city,” meaning that it was considered the 34th most dangerous city. Associated Press, *Ranking of least most dangerous cities*, USA Today.com, Oct. 30, 2006, http://www.usatoday.com/news/nation/2006-10-30-city-crime-list_x.htm. (last visited June 21, 2012).

Ker v. California, supra (warrantless and unannounced entry of private dwelling by police permissible to prevent destruction of evidence). These exceptions to the warrant requirement “have been jealously and carefully drawn.” *Jones v. United States*, 357 U.S. 493, 499 (1958). This exception was not present here.

III. THE DEFENDANTS UNLAWFULLY ENTERED THE PLAINTIFF’S CURTILAGE WITHOUT A WARRANT.

The plaintiff possessed a constitutionally protected privacy expectation upon which these defendants infringed when they entered without a warrant. The defendants have made much about the type of fence surrounding the home and whether certain parts of the yard were visible from the sidewalk, or from a satellite photograph, suggesting essentially that only a yard surrounded by an opaque wall or hedge deserves protection under the fourth amendment. In this case, those are irrelevancies that have served only to deflect from the blatantly illegal behavior of these defendants. They have been permitted to offer opinions and arguments that contradict established law on the nature of privacy in a fenced in residential yard. Moreover, they have suggested somehow that a homeowner’s yard in an urban area is deserving of no constitutional protection. Whether these arguments are race-based, class-based, or a result of sheer ignorance, they are deserving of no consideration. The Supreme Court unequivocally has extended the same constitutional protection to the area around a landowner’s home. This area is known as the “curtilage.” And it is the plaintiff’s uncontested subjective expectation that plays the most important role in this determination.

A. The *Dunn* Factors

“The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the Fourth Amendment.” *United States v. Dunn*, 480 U.S. 294, 300-02 (1987) (barn outside fenced area of

ranch house not within curtilage; but “area surrounding house enclosed by a fence” was). “[T]he Fourth Amendment protects the curtilage of a house and ... the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.” *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). As the Supreme Court noted in *Oliver*, “[p]rivacy expectations are normally highest and are accorded the strongest constitutional protection in the case of a private home *and the area immediately surrounding it.*” *Id.* at 174 (emphasis supplied). Thus, under the fourth amendment, the same considerations apply to curtilage as they do to the interior of one’s home.⁵

Oliver expounded on the sanctity of the home by explaining that a homeowner’s curtilage was part of the home itself. “[T]he Fourth Amendment protects the curtilage of a house and . . . the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.” *Oliver*, 466 U.S. at 180.

Some of the factors that define curtilage are set forth in *United States v. Dunn*, *supra*, 480 U.S. at 300-02. The court is familiar with the four general factors that were explained to the jury and which were used in determining that the plaintiff’s yard (both side and rear) was part of the curtilage for privacy purposes. In determining whether a particular area constitutes curtilage, the touchstone inquiry is “whether the area harbors the intimate activity associated with the sanctity of a man’s home and the privacies of life.” *United States v. Dunn*, 480 U.S. 294, 300 (1987).

There are four factors that bear upon the question of whether an area is curtilage:

- (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the

⁵ Of course, even within the home, there are certain places (such as a bathroom or bedroom) that a homeowner may consider more private than others, but courts do not differentiate between such locations when analyzing warrantless entries and privacy interests.

area from observation by people passing by.

Brocuglio v. Proulx, 478 F. Supp. 2d 297, 302-03 (D. Conn. 2007), *aff'd*, 2009 WL 1059896 (2nd Cir. Apr 21, 2009), *citing Dunn*, 480 U.S. at 301. These four factors are nonexclusive and not intended to be used in a mechanical way. *Id.*, at 303. They merely are “guidelines meant to shed light on the ultimate question whether an individual has a reasonable expectation of privacy in a given area; the factors really have no independent relevance aside from guiding a court’s reasonable expectation of privacy analysis.” *Id.*, at 303. A jury instruction that incorporated these principles is part of this case. Here, it is plainly obvious that the side and rear yard of the plaintiff’s home on Enfield Street constituted part of the home’s curtilage, entitled to the same privacy protections as the inside of the home. The area in question was immediately adjacent to and behind the house. It was enclosed by chain link and stockade wood fences, with a gate for the walkway to the front steps and opening across the driveway. Part of the property was bounded by an opaque windowless wall of a garage. The property was posted with “Beware of Dog” signs; at least one clearly visible from the street. There is no doubt that the plaintiff took all necessary steps to protect his privacy. The criteria under *Dunn* easily were met in this case. Therefore, a warrant was required before these defendants veered from the walkway.

B. The Plaintiff Possessed a Reasonable Expectation of Privacy in the Yard Surrounding His Home.

In its oral ruling denying the plaintiffs’ cross-motion for summary judgment in 2009, this Court noted that there was insufficient evidence submitted at that time regarding the use put to the north side of the property to definitively determine the privacy interests of the plaintiffs. Moreover, the plaintiffs submit that the issue is not just the entry to the side yard, but the defendant’s inspection of the rear yard, since the defendants were not in any position to see into the back yard from a lawful vantage point. If they were, they would conclude that there was no abandoned Nissan Maxima and that the “tip” was not reliable. The property was fenced on all

four sides, with openings only for the driveway and the front walkway to the front door. At trial, the uncontested evidence of the expectation of privacy was established beyond all doubt. There were no utility meters (other than a wireless water meter) located on the north side; the pictured stand pipes were not attached to any oil tanks, and the house was heated with gas. Mr. Harris testified that in order to place a wireless water meter on the north side of his property, the water company first obtained his permission, and needed his permission to enter in order to repair or replace it. K. used the area to play, engage in squirt gun fights, and run around the area with the dogs. The rear yard was used for cookouts, entertaining friends, and in warmer months, a portable swimming pool for K. The defendants offered nothing to contradict this testimony.

The fact that this jury “did not reach a conclusion” regarding curtilage is irrelevant since the undisputed evidence demonstrates beyond reasonable doubt that the area in question constituted curtilage – whether the defendants went no further than the northwest corner of the house and peered into the rear yard or entered it, as all of their prior admissions (other than at trial) prove. The defendants’ argument that the side yard was visible from the street does not alter the equation. Those cases that have permitted police to enter an area visible from a public vantage point dealt with whether or not the evidence was therefore in a public place; not whether police could go to the farthest vantage point from the street, and then search from that location. *See, e.g., Florida v. Riley*, 448 U.S. 445, 449 (1989) (“police may see what may be seen from a public vantage point”); *California v. Ciraolo*, 476 U.S. 207, 213-215 (1986) (no expectation of privacy in fenced backyard as seen from a fixed aircraft flying at 1000 feet). As just one example of the fallacy of this argument, an open garage or porch door might be visible from the street, but certainly that would not entitle officers to enter that area and look around under the fiction that they could see that spot from the sidewalk. Therefore, there is no factual conclusion on this issue OTHER THAN the fact that the north side of plaintiffs’ property constituted protected curtilage.

The defendants argued essentially that people who live in urban environments such as

Hartford have minimal or no privacy rights, and also claim that if the officers can see a location from the street, they can go to it without a warrant. The former argument is – if not outright racist – certainly discriminatory and class-based. It is outrageous to suggest that homeowners in a city have less constitutional rights than suburbanites, or that the latter *ipso facto* have less rights than rural dwellers. It is apparent that the defendants do not understand what curtilage means or what it protects. Whether an area *less proximate* to a house constitutes curtilage – as opposed to an open field – depends on the distance from the dwelling and the neighborhood in which the dwelling is located. *United States v. Reilly*, 76 F.3d 1271, 1275-76 (2d Cir. 1996). Even *Dunn* makes this crystal clear.

In general, “the closer the area is to the home, the more reasonable an inference that the area is curtilage.” *Hart v. Myers*, 183 F. Supp. 2d 512, 522 (D. Conn. 2002). *Hart* involved “a rustic wooden structure, at best a part-time residence, located in the middle of deep woods.” *Id.* at 521. While Judge Underhill’s opinion, upon which defendants rely, acknowledges that curtilage can extend *further* in rural areas, the contrary in a more urban setting is not true and certainly not suggested by that opinion or any other case. A fenced yard of a home in a residential area – whether in an urban or suburban neighborhood – constitutes curtilage, according to Judge Underhill, as long as there is evidence “to suggest the demarcation of a domestic enclosure.” *Id.* at 525. That judge made it clearer a few years later when he said: “Although there may not be an actual legal presumption that a fenced-in back yard is curtilage, curtilage is often defined as the area immediately adjoining the home.” *Brocuglio*, 478 F. Supp. 2d, at 304. *See, also, State v. Brocuglio*, 264 Conn. 778 (2003). Moreover, in order for the existence of a fence to weigh in favor of the party claiming the area in question is curtilage, it is not necessary, as the defendants erroneously claimed, for the fence to completely encircle the area. *See, e.g., Reilly*, 76 F.3d at 1277-78 (2d Cir. 1996) (dilapidated fencing on three sides of an area supports determination that the area is curtilage). Privacy accorded to curtilage will not be

defeated simply because an officer can see over or around a fence from a lawful vantage point. *Brocuglio v. Proulx*, *supra*, 478 F. Supp. 2d at 306-307.

Property does not even have to be close to a house to constitute curtilage. The Second Circuit held that “a cottage 375 feet from a house and a wooded area 125 feet from the house could, in the circumstances of this case, fall under the definition of curtilage set forth in *Dunn*.” *United States v. Reilly*, 76 F.3d 1271, 1275 (2d Cir.1996). In that case there were fences on only three sides of a property and woods adjacent to the fourth. As for the cottage area being enclosed, the court found that it was part of the curtilage because there was no internal fencing separating the main house from the rest of the property. *Id.* at 1278. Since the court also found that the cottage area “harbored the ‘intimate activity associated with the sanctity of a man's home and the privacies of life,’” and the grooming of the land made it readily apparent to observers that the area was private, the court concluded that Reilly’s curtilage was invaded. *Id.* at 1276, 1279 (quoting *Dunn*, *supra*, 480 U.S. at 301).

The Sixth Circuit, following *Reilly*’s lead, also found that a defendant’s curtilage had been invaded in a physical setup similar to that of the plaintiff’s in the instant case. *United States v. Jenkins*, 124 F.3d 768 (6th Cir.1997). First, the court noted that the defendants' backyard was not large and in close proximity to their house. *Id.* at 773. The yard was enclosed on three sides by a wire fence, making it impossible for someone to enter the yard from outside without using the gate or climbing over the fence. *Id.* The court felt that “the fact that the yard and the house lie within the same fenced-off area is particularly significant.” *Id.* The defendants had put their backyard into use for various purposes. *Id.* Lastly, the court found that the defendants took steps to protect their backyard from observation by passing individuals. *Id.* “Taken together, as they must be,” the court noted, “the *Dunn* factors militate in favor of the conclusion that defendants' backyard ‘is so intimately tied to [their] home itself that it should be placed under the home's ‘umbrella’ of Fourth Amendment protection.’” *Id.* (quoting *Dunn*, 480 U.S. at 301). The court

concluded that “the defendants had a reasonable expectation that their backyard would remain private and free from physical invasion.” *Id.*

The third curtilage factor is whether the property is used to “harbor those intimate activities associated with domestic life and the privacies of home.” *Reilly*, 76 F.3d at 1277-78. The relevant inquiry is the “actual use of the property, not the knowledge that the officers had or should have had about use at the time of their entry.” *Id.*, at 1278 (citing *Dunn*, 480 U.S. at 305). As previously noted, the testimony was uncontested that the yard was used for activities associated with domestic life, including entertaining friends, barbecues, and a kiddie pool.

With regard to the fourth factor, courts consider whether the area in question was visible from a place where police officers had a right to be legally; not whether they can go to a spot visible from a public place and then look around that secondary area. *See, Brocuglio*, 478 F. Supp. 2d, at 305. If the opposite were true, as noted, then nothing could prevent the defendants from peering into windows from the north side of the house, or spy on the plaintiff while on his rear porch.

In this case, all four factors weighed conclusively in favor of the determination that the land surrounding the house located at 297 Enfield Street was curtilage. The yard was immediately adjacent to the home. The entire property was enclosed by fences, with openings only for the driveway and a gated walkway. The plaintiffs used their rear and side yard as a normal family would: to cook, eat, entertain, and as a safe place where a child could play and care for the family pets. By their own admission, the defendants could not see into the rear yard at 297 Enfield Street until they reached the northeast (rear) corner of the house; thus, portions of the yard effectively were shielded from public view. Finally, the plaintiff had taken steps to warn the public away from his property by posting “Beware of Dog” signs in places that easily were visible from the street. The defendants have taken the fourth factor, visibility, and turned its meaning on its head. Being able to see into a yard from a public place only is relevant if the area

to be searched was visible from that public place. Otherwise, as noted above, officers can claim they are entitled to go to any spot in a yard visible in a linear direction from the road, and then peak into house windows, search cars, or rummage through a shed or garage on the property, even if they can't see that spot from a public vantage point. The theory defies logic. In any event, the defendants do not deny that they traveled at least to the rear corner of the house and looked to the southwest back yard where Seven spotted them. Therefore, the warrantless "search" included viewing the back yard from a place these defendants had no right to be.

There only is the uncontested evidence that the side and rear yard of the plaintiff's home constituted curtilage protected from warrantless government intrusion in violation of the Fourth Amendment in the same manner as the interior of the home itself. The features of the Harris' side and back yard are identical to what courts have found to be protected curtilage. The defendants went through a gate and walked around the north side of the house without the plaintiff's permission and without a warrant. It is uncontested that Mr. Harris possessed an expectation of privacy even on the side of the house that prevented intruders – including the officers from trespassing there. The defendants, by invading the plaintiff's curtilage without a warrant, committed an unlawful entry onto a constitutionally-protected part of the plaintiff's property. Regardless of the jury's failure to address this issue, despite a question on the subject, the area searched, indeed, was "curtilage" as a matter of law. The court must apply established Fourth Amendment jurisprudence as it applies to any warrantless entry of the home.

IV. THE DEFENDANTS ARE LIABLE FOR DAMAGES DUE TO THE WARRANTLESS INTRUSION.

A. The Defendants Entry of the Plaintiffs' Curtilage was Unlawful

The overwhelming – and indeed uncontested – evidence in this case demonstrates that the plaintiffs were victims of an unlawful warrantless entry into the curtilage of their home. The officers involved could not have reasonably believe that the search or seizure was constitutional

without a warrant. Their actions and use of deadly force on Seven constituted a disregard – if not utter contempt – for the just rights of privacy of homeowners in the City of Hartford. *See, Villo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (use of deadly force on pet dog justifiable only if it posed immediate threat AND use of force was unavoidable). The entire matter easily was avoidable by either securing the area or simply knocking on the door, which would have been required even with a warrant.”⁶

It is undisputed that the defendants sought no warrant nor did they bother to inquire about permission to enter the yard. There clearly was no emergency situation involving a danger to human life. There was no immediate danger to police or others, despite the outrageous and absurd self-serving statement by Pia that it was too dangerous for these armed uniformed police officers to drive around the block in a marked patrol cruiser in an effort to confirm or refute the existence of an abandoned vehicle in the rear yard. *See, Minnesota v. Olson*, 495 U.S. 91 (1990). Likewise, there was no evidence that a suspect might flee, since O’Hare and Pia entered the property solely to look for firearms purportedly stashed inside a phantom abandoned vehicle allegedly located in the rear yard, and not to arrest a suspect.

Furthermore, the defendants had no reason to believe that these non-existent firearms were in danger of being destroyed. To quote the Supreme Court’s opinion in *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), there was “no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant.” *Id.* Aside from the inherent difficulty in destroying a gun, the information the defendants possessed indicated that the guns were hidden in an abandoned car, which made their imminent destruction or transfer impossible.

⁶ Indeed, non-compliance with the “knock-and-announce” rule was not permissible here since there were no objective facts to conclude it was necessary to prevent destruction of evidence. *See, United States v. Banks*, 540 U.S. 31 (2003).

The defendants saw no one at all, and even denied observing the plaintiffs' Cadillac SUV, which was parked in plain sight adjacent to the house in the driveway on the south side, and is plainly visible in one of the photographs taken by Detective Baez that afternoon and displayed to the jury [Defense Exhibit #9]. Defendants' generalization that guns can be mobile, or expression of their subjective belief that someone *might* retrieve it before they obtained a warrant, without any articulated factual basis whatsoever, is deserving of no weight in this case. The imaginary guns were not going to get up and move by themselves. It is not the subjective belief of the officers that matters here. Only objective facts are relevant to the determination of exigent circumstances. The jury obviously was misled by this testimony and therefore reached a conclusion where there was no basis to do so. Otherwise, this same baseless proposition would constitute justification for breaking down the door of any house anywhere and shooting the occupants if the officers possessed a subjective fear of those individuals.

As the Supreme Court stated unequivocally in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971):

[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – *albeit* unconstitutionally -- in the name of the [government] possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of [government] power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of [governmental] authority. And where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

Id. (internal citations omitted).

Therefore, accepting the evidence presented at trial in the light most favorable to the defendants, it is absolutely clear that they violated the plaintiffs' Fourth Amendment rights by

illegally entering and searching the plaintiff's property and no exception to the warrant requirement applies. Therefore, the plaintiffs are entitled to judgment as a matter of law on the claimed fourth amendment unlawful search and seizure.

B. Shooting and Killing the Family Pet Was a Natural and Foreseeable Consequence of the Defendants' Illegal Entry

Under basic principles of tort law applicable to civil rights violations, the defendants are liable for all damage proximately caused by their illegal actions. Under § 1983 jurisprudence, tort defendants remain liable for the natural consequences of their actions. *Kerman v. City of New York*, 374 F.3d 93, 126 (2d. Cir., 2004). "Thus, an actor may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties." *Id.*, at 126-27. *See also, Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d. Cir. 1998) (proximate cause analysis appropriate in §1983 cases); *Cooper v. City of Hartford*, 2009 WL 2163127 (D. Conn., July 21, 2009) (police may be held liable for a wrongful death because of defendant officers' use of excessive force on an already wounded individual).

Here, the defendants entered the protected curtilage of the plaintiff's home without a warrant. They had their firearms drawn before they entered the backyard. The plaintiff resided at the property with his family and his two St. Bernards, and had exclusive use of this property. The minor plaintiff was in the rear yard with her pet. Mr. Harris posted signs on three sides of his house reading "Beware of the Dog." There were fences on all sides of the property, with the only unfenced section existing across the driveway. Thus, the defendants had express warning of the likely existence of dogs somewhere on the property, which certainly negates any claim that the yard was open to the public. It is entirely foreseeable and reasonable that a family with dogs would be in a fenced-in back yard with one or both of the dogs at any time, and it is equally foreseeable that a dog might bark and pursue an unknown person who trespassed and then abruptly turned and ran away. Therefore, by entering the plaintiffs' curtilage with their firearms

drawn, traveling to a place in the yard where they knew or should have known of the existence of dogs, and then turning and running away when spotted by the dog, the defendants created a situation in which the death of a beloved family pet not only was foreseeable, but preordained. Therefore, it is irrelevant whether O'Hare subjectively was afraid of Seven.

It was the defendants' unconstitutional conduct that resulted in the destruction of Seven, and disrupted the plaintiffs' lives. The court should reverse the jury verdict and enter judgment for the plaintiffs on the fourth amendment and illegal trespass counts. Because the remainder of the counts inextricably are intertwined with the erroneous jury finding, the remaining counts likewise should be reversed and scheduled for a new trial.

C. The Plaintiff is Entitled to Judgment N.O.V. for Common Law Trespass.

The Supreme Court has "long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law." *Bivens, supra*, at 403 U.S. at 392. The elements of common law trespass correctly were given to the jury, and there were no factual disputes that would justify the jury verdict. Therefore, in light of their erroneous conclusion regarding the non-existence of an exigent circumstance, the jury necessarily reached an erroneous conclusion about the trespass.

IV. THE REMAINING CLAIMS ARE SO INTERTWINED WITH THE JURY'S ERRONEOUS CONCLUSION THAT THE COURT SHOULD GRANT A NEW TRIAL ON ALL REMAINING ISSUES WITH PROPER GUIDANCE

As previously noted, a party may be entitled to a new trial when the jury's verdict is "seriously erroneous" or where it results in a miscarriage of justice. In light of the jury's gross misunderstanding of the law as it relates to the warrantless entry and its finding of "exigent circumstances," allowing the remainder of the verdict to stand would constitute a miscarriage of justice. *See also* Fed. R. Civ. P. 50(b), 59(a). "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct

and separable from the others that a trial of it alone may be had without injustice” *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500-01 (1931) (counterclaim must be relitigated at new trial).

It readily is apparent that if the jury properly understood that the defendants possessed no exigent circumstances to justify their warrantless entry, then their consideration and conclusion on the remaining counts likely would have been different. Therefore, the plaintiff asks the court to set aside the entire verdict.

CONCLUSION

For the foregoing reasons, the plaintiff asks for the entry of judgment as a matter of law on the fourth amendment and trespass claims. In addition, or in the alternative, the plaintiff requests a new trial.

THE PLAINTIFF–
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (Fed Bar #ct00119)
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: jon@schoenhorn.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court’s electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court’s CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

F:\SHARED\CLIENTS\Harris-Ayers\Post Trial Matters\exigent circumstances agument.wpd

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JULY 3, 2012

BILL OF COSTS

Pursuant to Local Rule 54(a), the Defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, hereby submit their bill of costs in the above-captioned case. The Court entered judgment for the Defendants on May 29, 2012. This Bill of Costs is filed within ten (10) days after the Judgment became final due to the expiration of the appeal period pursuant to Local Rule 54(a)1. A verification pursuant to 28 U.S.C. § 1924 is attached hereto as **Exhibit A**.

1. Local Rule 54(c)1 – Fees of Clerk and Marshal

Subpoena for non-party witness Wheeler Clinic	\$50.00
Subpoena for non-party witness Institute of Living	\$50.00

(See, Exhibit 1 attached to Exhibit B)

2. Local Rule 54(c)2 – Fees of Court Reporter

Deposition Transcript for Glenn Harris (Original + 1 copy)	\$536.50
Court Reporter Appearance Fee for Harris	\$ 95.00
Deposition Transcript for KH (orig + 1 copy)	\$222.00
Deposition Transcripts for JohnMichael O'Hare, Anthony Pia and Gabe Laureano (1 copy)	\$795.00

(See, Exhibit 2 attached to Exhibit B)

**3. Local Rule 54(c)3 – Fees for Exemplification
and Copies of Papers Necessarily Obtained for
Use in the Case**

Documents Admitted Into Evidence (color copy – 19 @ \$1.00)	\$19.00
Documents Admitted Into Evidence (black & white copy – 68 @.14)	\$ 9.52

(See, Exhibit 3 attached to Exhibit B)

**4. Local Rule 54(c)5 – Maps, Charts, Models,
Photographs, Summaries, Computations and
Statistical Summaries**

Cost for Aerial Map	\$650.00
---------------------	----------

(See, Exhibit 4 attached to Exhibit B)

TOTAL COSTS REQUESTED: \$2,427.02

DEFENDANTS,
JOHN MICHAEL O'HARE
and ANTHONY PIA

By



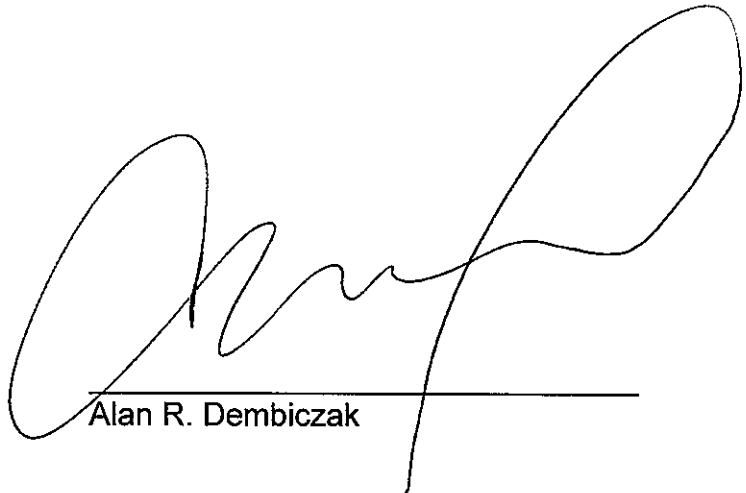
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on July 3, 2012, a copy of the foregoing Bill of Costs was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103



Alan R. Dembiczak

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.
as Guardian for K.H., a minor child

NO.: 3:08CV01644-RNC

v.

JOHNMICHAEL O'HARE,
ANTHONY PIA, and
CITY OF HARTFORD

JULY 3, 2012

VERIFICATION OF ALAN R. DEMBICZAK

The undersigned, being duly sworn, hereby deposes and says:

1. I am over eighteen (18) years of age and I believe in the obligation of an oath;
2. I am a member of the Bars of the State of Connecticut and the United States District Court for the District of Connecticut;
3. I represented the defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, in the above captioned case and have knowledge of the facts of the case and the costs incurred by the defendants in defending this case;
4. A true and accurate copy of the invoice for the subpoenas of non-party witnesses is annexed as **Exhibit 1**;
5. True and accurate copies of the invoices for Deposition Transcripts and Court Reporter Appearance Fees are annexed as **Exhibit 2**;
6. True and accurate copies of the invoices for copies of Documents Admitted Into Evidence are annexed as **Exhibit 3**;
7. A true and accurate copy of the invoice for the cost of the Aerial Map used at trial is annexed as **Exhibit 4**;


8. The items in the Defendants' Bill of Costs are correct and have been necessarily incurred in this case and the services for which fees have been charged were actually and necessarily performed.



ALAN R. DEMBICZAK

STATE OF CONNECTICUT)
) ss: Hartford
COUNTY OF HARTFORD)

Subscribed and sworn before me this 3rd day of July, 2012



Jay Don Francisco, Esq.
Commissioner Of The Superior Court

EXHIBIT 1

May 13, 2012

Connecticut Process Serving, LLC

67 Burnside Avenue
East Hartford, CT 06108
860.528.2920, (860) 528.2720 Fax

RETURN SERVICE REQUESTED

Our EIN # **06-1445325**



Alan R. Dembiczak, Esquire
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-1121

860-249-1361 Business
860-249-7665 Fax

Reference Invoice # **142260** when remitting.
Your Refrence No.

Glen Harris ppa as Guardian of K.H. vs City of
Hartford, et al

Service of Process - Routine

\$50.00

Docket Number: **3:08-CV-01644 (RNC)**

Subpoena In a Civil Case;

Completed Wheeler Clinic

Manner: **CORPORATE**

on 05/15/2012 at 1:50 PM,
at Keeper of Records 91 North West Drive
Plainville, CT 06062

by Michael Walton

Action/Hearing Date **05/21/2012, @ 9:00 AM.**

BALANCE DUE:

\$50.00

Thank You!
We Appreciate Your Business.

~~A \$15.00 Administrative fee will be assessed to each invoice 45 days outstanding!~~

205-15146

HARRIS v O'HARE

VCHR61473 CASE _____

CHX _____ PAID _____

May 16, 2012

Connecticut Process Serving, LLC

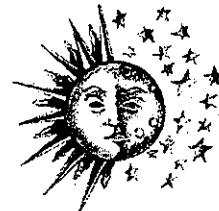
67 Burnside Avenue

East Hartford, CT 06108

860.528.2920, (860) 528.2720 Fax

RETURN SERVICE REQUESTED

Our EIN # **06-1445325**



Alan R. Dembiczak, Esquire

Howd & Ludorf, LLC

65 Wethersfield Avenue

Hartford, CT 06114-1121

860-249-1361 Business
860-249-7665 Fax

Reference Invoice # **142263** when remitting.
Your Reference No.

Glen Harris ppa as Guardian of K.H. vs City of
Hartford, et al

Service of Process - Routine

\$50.00

Docket Number: 3:08-CV-01644 (RNC)

Subpoena In a Civil Case

Completed **The Institute of Living**

Manner: **CORPORATE**

on 05/14/2012 at 12:20 PM,

at c/o Hartford Hospital, Keeper of Records 80

Seymour Street

Hartford, CT 06106

by Christine Foran

Action/Hearing Date **05/21/2012, @ 9:00 AM.**

BALANCE DUE:

\$50.00

Thank You!
We Appreciate Your Business.

A \$15.00 Administrative fee will be assessed to each invoice 45 days outstanding!

205-15146

Harris v O'Hare

VCHR61474 CASE _____

CHX _____ PAID _____

EXHIBIT 2

INVOICE

Niziankiewicz & Miller Reporting Services, LLC
 972 Tolland Street
 East Hartford, CT 06108-1533
 Phone:860-291-9191 Fax:860-528-1972

Thomas R. Gerarde, Esquire
 Howd & Ludorf, LLC
 65 Wethersfield Avenue
 Hartford, CT 06114-1190

Invoice No.	Invoice Date	Job No.
14903	6/10/2009	22037
Job Date	Case No.	
5/6/2009	3:08CV01644-RNC	
Case Name		
Harris vs. O'Hare		
Payment Terms		
Due upon receipt		

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

Glen Harris		536.50
Appearance Fee	95.00	95.00
Postage	6.00	6.00

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

K.H.		222.00
SALES TAX		51.57

TOTAL DUE >>>	\$911.07
-------------------------------	-----------------

Court Reporter: Gosselin

THANK YOU!!!
 WE APPRECIATE YOUR BUSINESS!!!

After 30 days a Finance Charge with a periodic rate of 1.5% on the overdue balance will be charged.
 (ANNUAL PERCENTAGE RATE = 18.00%)

Tax ID: 06-1113444

Phone: 860-249-1361 Fax:

Please detach bottom portion and return with payment.

Thomas R. Gerarde, Esquire
 Howd & Ludorf, LLC
 65 Wethersfield Avenue
 Hartford, CT 06114-1190

Invoice No. : 14903
 Invoice Date : 6/10/2009
Total Due : \$ 911.07

Remit To: **Niziankiewicz & Miller Reporting Services,
 LLC
 972 Tolland Street
 East Hartford, CT 06108-1533**

Job No. : 22037
 BU ID : 1-MAIN
 Case No. : 3:08CV01644-RNC
 Case Name : Harris vs. O'Hare

Andrews Reporting Service

Court Reporters

INVOICE

July 2, 2009

Thomas R. Gerard, Esq.
Howd & Ludorf
65 Wethersfield Avenue
Hartford, CT 06114

Sandy K. Visentin d/b/a
Andrews Reporting Service, LLC
Fed. I.D. No. 06-1331990

Invoice No. 9-207

IN RE: Glen Harris, individually and PPA vs. Johnmichael O'Hare, et al.

CASE NO.: 3:08-CV-01644 (RNC)
DEPO DATE: June 3 and June 15, 2009
DEPONENT(S): Anthony Pia – 100 pgs
Johnmichael O'Hare – 136 pgs
Gabriel Laureano – 82 pgs

TRANSCRIPT:

1 copy: 318 pgs @ 2.50/pg	\$ 795.00
EXHIBIT COPIES: 30 p @ .20/pg	6.00
ASCII DISK: (3 depos)	75.00
WORD INDEX: (3 depos)	75.00

SUBTOTAL:	\$ 951.00
6 % SALES TAX:	n/a
DELIVERY/POSTAGE:	12.95

TOTAL DUE: \$ 963.95

****PAYMENT DUE UPON RECEIPT****

THANK YOU
Reporter: Sandy Visentin, RPR, LSR

EXHIBIT 3

ONE Stop Copy Shop

111 Pitkin St

East Hartford, CT 06108

Phone # (860) 722-9992 Fax # (860) 722-9507

Tax ID:61-1418869

Invoice

Date	Invoice #
5/17/2012	12-01579

Bill To
Howd & Ludorf 65 Wethersfield Avenue Hartford, CT 06114-1190

Redacted Meds for Trial
Exh. Notebooks & CD's

Ordered By	Rep	Terms	Reference
Sophia	HS	Net 15	205-15146

Description	Quantity	Rate	Amount
8 1/2 x 11 Copies "D" Work	594	0.14	83.16T
8 1/2 x 11 Color Copies	45	1.00	45.00T
3 Hole Drilling	710	0.01	7.10T
Document Scanning	66	0.14	9.24T
Color Scanning 8.5x11	5	2.00	10.00T
File Labeling	5	1.50	7.50T
CD Creation	1	25.00	25.00T
CD Duplication	5	15.00	75.00T

205-15146

Harris v. O'Hare
VCHR61541 CASE _____

CHX _____ PAID _____

Sales Tax (6.35%) ~~\$16.64~~**Total** \$278.64

A finance charge of 1.5% will be added to all invoices
over 30 days.

EXHIBIT 4

Design Professionals, Inc.

P.O. Box 1167
425 Sullivan Avenue
South Windsor, CT 06074-7167

Invoice

Invoice #: 3171-1

Invoice Date: 5/21/2012

Due Date: 6/11/2012

Bill To:

Atty Alan Dembiczak
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114

CIN: 8953

Description	Hours/Qty	Rate	Amount
297 Enfield Street Hartford, CT			
Golden Aerial Surveys, Inc. Please send check (\$570.) to: 141 Mt. Pleasant Road, P.O. Box 747 Newtown, CT 06470			
Director of Survey Courtesy discount Please send check (\$80) to Design Professionals, Inc.	0.75 -1	120.00 10.00	90.00 -10.00
<p><i>* sent to client 6/22/12</i></p> <p><i>#205-15146</i> <i>Harris & O'Hare/Hfd</i> RECEIVED JUN 22 2012 BY: <i>Vm</i></p> <p><i>205-15146</i> <i>- OK to Pay</i> <i>- ARD</i></p>			
Total			\$650.00

We are now located at 425 Sullivan Avenue SW. Tel. 291-8755. Kindly remit amount shown above. Terms: net (20) days from invoice date. Any questions should be directed to DPI within 10 days of the invoice date. Non-communication will assume acceptance of invoice as written. Overdue accounts will be charged a late payment fee of 1.5% per month or to the extent allowed by law. Thank you.

RECEIVED
MAY 25 2012

BY:

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn

Jon L. Schoenhorn

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually, and P.P.A	:	CIVIL ACTION NO. 3:08CV1644(RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs,	:	
V.	:	
	:	
JOHNMICHAEL O'HARE;	:	
ANTHONY PIA; and	:	
CITY OF HARTFORD,	:	
Defendants.	:	JULY 6, 2012

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION
TO THE DEFENDANTS' MOTION FOR JUDGMENT
AS A MATTER OF LAW**

The plaintiff, Glen Harris, individually and on behalf of his minor daughter, K.H. (collectively "plaintiff"), submits this memorandum in objection to the defendants' motion for judgment purportedly pursuant to Fed. R. Civ. P. 50. For the reasons set forth below, the plaintiff submits that the defendants' motion is utterly without merit and requests that the court deny the defendants' motion for judgment as a matter of law. Moreover, and for the articulated reasons set forth in the plaintiff's motion under Rules 50 and 59 filed on June 27, 2012 (Document Nos. 117 and 117-1), judgment as a matter of law should be granted to the plaintiff, and defendant's motion is both baseless and without justification. The plaintiff incorporates his arguments in that memorandum herein, without repeating them.

I. THE DEFENDANTS ARE NOT ENTITLED TO MAKE A MOTION FOR JUDGMENT AS A MATTER OF LAW

There is no legal basis for the defendants' filing a motion for judgment as a matter of law in a case where the jury already returned a verdict in their favor. Fed. R. Civ. P. 50, by its terms, implies that only the losing party at trial is entitled to move for judgment as a matter of law notwithstanding the verdict. The Second Circuit has stated that a Rule 50 motion should be denied, "unless: (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is

such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against it.” *Lawyers Title Ins. Corp. v. Singer*, 792 F. Supp. 306, 309 (D. Conn. 2011) *citing Lavin-Mceleney v. Marist College*, 239 F.3d 476, 480 (2d Cir. 2001). Thus, the jury must arrive at a verdict *against* the movant in order for that party to be able to claim entitlement to judgment as a matter of law *notwithstanding* the jury’s verdict. Indeed, the Second Circuit has inserted the words “prevailing” and “non-prevailing” in at least one decision in order to clarify the parties’ roles in a Rule 50 motion when it explained that “judgment notwithstanding the verdict permits the trial court to correct a jury’s decision where ‘(1) there is a complete absence [of] probative evidence to support the verdict for the prevailing party or (2) the evidence is so strong and overwhelmingly in favor of the non-prevailing party that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against it.’” *Unifax, Inc. v. Champion International, Inc.*, 683 F.2d 678, 684 (2d Cir. 1982) (internal brackets and citations omitted); *see also, Warfield v. City of Chicago*, 679 F. Supp. 2d 876, 891 (N.D. Ill. 2010) (Rule 50(b) permits the “non-prevailing party to make a renewed motion for judgment as a matter of law”); and *Z4 Techs., Inc. v. Microsoft Corp.*, 507 F.3d 1340, 1346 (Fed. Cir. 2007) (party to which Rule 50 refers is the “winning” party; the jury’s verdict must be affirmed unless “‘a reasonable jury would not have a legally sufficient evidentiary basis to find for the winning party,’ Fed. R. Civ. P. 50(a)(1)”) (internal bracket omitted). The defendants have not even articulated any standard for a Rule 50 motion, nor have they explained why a judgment in their favor should be reversed notwithstanding the verdict they obtained.

Moreover, the defendants did not adhere to the Rule 50 standards that require that the court “must consider all [of] the evidence in a light most favorable to the non-mover, must draw reasonable inferences favorable to the non-mover, and must not substitute its choice for that of the jury between conflicting elements in the evidence.” *Ortho Diagnostic Systems, Inc. v. Miles Inc.*, 865 F. Supp. 1073, 1078 (S.D.N.Y.1994), appeal dismissed, 48 F.3d 1237 (Fed. Cir.1995); *see also Samuels v. Air Transp. Local 504*, 992 F.2d 12, 14 (2d Cir. 1993). In their post-trial

motion, the defendants rely on their own self-serving version of events and do not discuss the evidence in the light most favorable to the plaintiff; further demonstrating that the defendants' motion is not well taken.

Here, rightly or wrongly, the jury ruled in the defendants' favor at trial and, thus, because they are the prevailing party, they are not entitled under any theory to move for judgment as a matter of law pursuant to Rule 50.

II. THE DEFENDANTS UNLAWFULLY ENTERED THE PLAINTIFF'S CURTILAGE WITHOUT A WARRANT AND THERE WERE NO EXIGENT CIRCUMSTANCES TO JUSTIFY THEIR ACTIONS

In what appears to the undersigned to be a shocking lack of understanding about the tenets of the fourth amendment, the defendants continue to misapply the legal principles of both curtilage and exigent circumstances despite the plaintiff's best efforts to explain these terms both prior and during the trial. As the plaintiff set forth in his memorandum in support of summary judgment (Doc. No. 45) and, again, in his memorandum in support of his motion for judgment as matter of law and/or for a new trial (Doc No. 117-1), the law is unequivocal and fully established that one's "curtilage," i.e., the land around a home, is afforded the same constitutional protection as the home itself. In addition, and contrary to the defendants suggestions now and at trial, a homeowner's fenced yard in an urban environment is no less deserving of constitutional protection than one in a suburban or rural environment; indeed, to insinuate otherwise is offensive because it suggests that both race- and class-based considerations should play a role in determining fourth amendment privacy, and therefore, should be disregarded entirely. *See also, State v. Robinson*, 290 Conn. 381 (2009), *affirming* 105 Conn. App. 179 (2008). The defendants' continued refusal to apply settled law is disconcerting.

The defendants' warrantless search here cannot be justified by exigent circumstances under any version of the facts.¹ The suggestion or specter of firearms does not create exigent

¹ The plaintiff also objected on May 18, 2012 in writing to the defendants' eleventh hour assertion of the exigent circumstances exception to the warrant requirement in their addendum to the joint trial memorandum, since it never was raised before then. (Doc. No. 96).

circumstances and, here, the defendants failed to meet their heavy burden of demonstrating that there were any other “emergency” circumstances that would justify entering the plaintiff’s yard without first trying to obtain a warrant, eschewing the need to seek permission, knock and announce their purpose, or secure the premises until (or unless) a search warrant could be obtained. (*See* Doc. No. 117-1, pp. 8-14). The defendants presented nothing at trial to prove that the alleged firearms were in danger of being destroyed or that they were engaging a suspect in pursuit. (*Id.*). Certainly, there were no objective facts to lead to this conclusion. Therefore, no exigent circumstances of even a remote or speculative nature existed to justify the warrantless search of the plaintiff’s private yard. Indeed, plaintiff submits that the argument itself is specious under these facts. For this reason, the defendants’ motion for judgment as a matter of law should be denied.

III. THE COMMUNITY-CARETAKING EXCEPTION DOES NOT APPLY HERE

The defendants now seek to interject a defense that they raised for the first time right before trial: that their conduct on the date in question falls under the community caretaker exception to the warrant requirement of Fourth Amendment. The plaintiff filed an objection to the assertion of this claim on May 18, 2012. (Document No. 96). Defendants’ argument fails, in any event, because there is no legal justification for it.² Once again, the defendants have tossed in a legal term for which there is no basis in fact here, and shows that defendants are ignorant of fourth amendment precedent and its recognized exceptions.

It is true that the Supreme Court has recognized a “community caretaker” function exception to the warrant requirement of the Fourth Amendment. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Court held that the warrantless search of an impounded vehicle to search for

² Defense counsel’s attempt to raise this issue again in an improper post-trial motion arguably is frivolous and constitutes a needless waste of judicial resources pursuant to Fed. R. Civ. P. 11(b), and plaintiff’s counsel’s time. The court already concluded there was *no basis* to instruct the jury on this issue and rejected it at trial. To now argue that it constitutes a grounds for judgment *as a matter of law*, is outrageous.

a firearm that police knew was there was constitutional under a “community caretaker” function because the police exercised a form of custody of the car and its contents by towing it as a road hazard after it was involved in a motor vehicle accident and the owner was unavailable to remove it himself. *Id.* at 442-43. The court noted that police officers act in a “community caretaking” capacity when they fulfill a public safety role that is “*totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.*” *Id.* (*emphasis supplied*); *see also United States v. Miner*, 956 F.2d 397, 399 (2d Cir. 1992) (officers’ warrantless search of the defendant’s truck lawful because they were acting in a “community caretaking” capacity when they searched the interior of the vehicle secondary to the defendant’s complaint that it had been vandalized). However, there are many things that public officials do that nevertheless require warrants when the home or yard are invaded. Even zoning inspections – which are unrelated to crime – require warrants. “Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search, but the necessity for the warrant persists.” *Michigan v. Tyler*, 436 U.S. 499, 505 (1978). *See also Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (warrant required for administrative searches of residences for safety inspections); *see also, Feller v. Township of West Bloomfield*, 767 F. Supp.2d 769 (E.D. Mich. 2011) (community caretaking function did not justify officials’ warrantless entry into the plaintiff’s yard to post notices of wetlands violations).

In their memorandum, the defendants claim that the community caretaking exception, as defined in *Cady*, applies to home entries. (pp. 24-33). This simply is not the case. The myriad cases that the defendants cite for this proposition, which go on for pages and pages, mostly relate to emergency circumstances occurring within the community caretaking exception that are divorced from crime and the seizure of contraband. Some of the cases that the defendants cite involve entry of homes at night in response to noise complaints (i.e., ongoing public nuisances) after no one answered the door. *See e.g., United States v. Rohrig*, 93 F.3d 1506 (6th Cir. 1996); and *United States v. York*, 895 F.2d 1026 (5th Cir. 1990). Other cases involved the police acting

on what they believe to be emergency situations to save someone's life or limb. *See e.g., United States v. Quezada*, 448 F.3d 1005, 1007-08 (8th Cir. 2006) (deputy knocked on front door, in an attempt to serve civil papers, and entered after no one answered but the door yielded to her knock and the lights and television, which were on, indicated that someone inside might be in need of help); *State v. Deneui*, 775 N.W.2d 221, 226 (S.D. 2009) (police officers smelled ammonia fumes outside of home and made sure no one inside had succumbed to noxious fumes); *State v. Witczak*, 23 A.3d 416 (N.J. Super. 2011) (police officers checked in on homeowner who just had a gun pointed at her); and *People v. Davis*, 497 N.W.2d 910 (Mich. 1993) (police officers responding to a call about gunshots).

The defendants provide no analysis that relates the facts of any of the above cases – a non-exhaustive sampling of the many cases cited in the defendants' memorandum – to the case at hand; perhaps because the defendants tacitly acknowledge that the cases are, in fact, inapposite to the facts here. It is as if defense counsel opened a horn book, copied a list of cases, and left the plaintiff to conjecture how those cases are relevant to defendants' argument.

Indeed, the defendants fail – or refuse – to understand that the “emergency exception” to the warrant requirement is a component of the police's community caretaking function and – like other exigencies – requires immediate response to prevent harm to life or limb. In *Brigham v. Stuart*, 547 U.S. 398, 406 (2006), illustrative of this principle, police officers' warrantless entry into a home was justified as an emergency, because the officers responded to a loud party complaint at 3 o'clock in the morning and heard an altercation occurring within the home, and saw someone through a screen door punch another person in the face. The Court noted that “[n]othing in the Fourth Amendment required them to wait until another blow rendered someone unconscious or semi-conscious or worse before entering.” *Id.* (internal quotations omitted). As the Connecticut Supreme Court further explained in *State v. Fausel*, 295 Conn. 785 (2010):

The emergency exception to the warrant requirement allows police "to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." *Brigham City v. Stuart*, *supra*, 547 U.S. at 400, 126 S.Ct. 1943. "The need

to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." (Internal quotation marks omitted.) *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). As a result, the use of the emergency doctrine "evolves outside the context of a criminal investigation and does not involve probable cause as a prerequisite for the making of an arrest or the search for and seizure of evidence." *State v. Klauss*, 19 Conn.App. 296, 300 (1989). "Nevertheless, the emergency doctrine does not give the state an unrestricted invitation to enter the home. [G]iven the rationale for this very limited exception, the state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat. ... The police, in order to avail themselves of this exception, must have valid reasons for the belief that an emergency exists, a belief that must be grounded in empirical facts rather than subjective feelings. ... It is an objective and not a subjective test. The test is not whether the officers actually believed that an emergency existed, but whether a reasonable officer would have believed that such an emergency existed." (Citations omitted; internal quotation marks omitted.) *State v. Geisler*, 222 Conn. 672, 691-92 (1991).

Id. at 794-95. *See also*, *State v. Ryder*, 301 Conn. 810 (2011) (search for missing teenager did not rise to the level of emergency justifying decision of officer to enter curtilage by hopping a small gate in order to peer into the windows of a residence). The *Fausel* Court's reliance on *Brigham City* is noteworthy. Astoundingly, the defendants cite *Brigham City* only in terms of "exigent circumstances" without recognizing that this also is a controlling Supreme Court case on the community caretaking function, as well. And, of course, since *Brigham City* was decided May 22, 2006 – a full seven months before the defendants' misconduct on December 20, 2006 – they hardly can claim ignorance of this proposition or argue that the law was not clear on the subject at the time.

There is no doubt that the "community caretaking" exception does not apply to the instant case. The defendants here were investigating a tip that they received from a gang-member about *gang-related crime* in the hopes of acquiring *evidence* of a *crime* – *illegal firearms* in a non-existent Nissan Maxima. They did not go to the plaintiff's house for any other reason and certainly not based on a fear that someone was hurt or dead. In fact, because possessing a firearm is not in and of itself a crime, the defendants' acknowledgment that they were looking for *illegal* firearms reveals that their conduct was not "totally divorced from the detection, investigation, or

acquisition of evidence relating to the violation of a criminal statute.” *Cady, supra*. For this reason as well, the defendants’ motion for judgment as a matter of law is meritless and should be denied.

IV. CONCLUSION

For each of the foregoing reasons, and for the reasons set forth in plaintiffs’ earlier memorandums, the plaintiff requests that the court deny the defendants’ motion for judgment as a matter of law.

THE PLAINTIFF–
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (Fed Bar #ct00119)
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: jon@schoenhorn.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court’s electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court’s CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JULY 16, 2012

**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR JUDGMENT
AS A MATTER OF LAW AND FOR NEW TRIAL**

**I. Legal Standards For Judgment as a Matter of Law Notwithstanding the
Verdict and for a New Trial**

Pursuant to Fed. R. Civ. P. 50(b), a court may grant a motion for judgment as a matter of law notwithstanding the verdict only when (1) there is “such a complete absence of evidence supporting the verdict that the jury's findings could only have resulted from sheer surmise and conjecture,” or (2) there is such an “overwhelming amount of evidence in favor of the movant that reasonable and fair minded” people could not have reached a verdict against the moving party. *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir.1993) (citing *Mattivi v. South African Marine Corp.*, “*Hugenot*,” 618 F.2d 163, 168 (2d Cir. 1980)). Notably, the court “must consider all [of] the evidence in a light most favorable to the non-mover, must draw reasonable inferences favorable to the non-mover, and must not substitute its choice for that of the jury between conflicting elements in the evidence.” *Ortho Diagnostic Systems, Inc. v. Miles Inc.*, 865 F. Supp. 1073, 1078 (S.D.N.Y.1994), appeal dismissed, 48 F.3d 1237 (Fed. Cir.1995).

In addition, the court cannot “pass on the credibility of the witnesses” *Samuels*, 992 F.2d at 11-12 (citing *Mattivi*, 618 F.2d at 167). Thus, a motion for judgment notwithstanding the verdict should be granted when the evidence, viewed in the light most favorable to the non-movants, reasonably permits only one conclusion, in the movant's favor.

Under Fed. R. Civ. P. 50(b), a motion for judgment as a matter of law may be joined by a motion for a new trial under Rule 59. Fed. R. Civ. P. 59 permits the district court to grant a new trial on all or some of the issues “after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). The decision whether or not to grant a new trial “on the ground that the verdict was against the weight of the evidence is committed to the sound discretion of the trial judge.” *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), cert. denied, 508 U.S. 952 (1993), abrogated on other grounds, *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). A motion for a new trial ordinarily should be granted only in instances in which the jury’s verdict can be seen as “seriously erroneous” or the verdict is a “miscarriage of justice.” *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998) (quoting *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir. 1997) (internal citations omitted)); see also *Piesco v. Koch*, 12 F.3d 332, 344 (2d Cir. 1993); and *Purnell v. Lord*, 952 F.2d 679, 686 (2d Cir. 1992). The jury’s verdict should be accorded greater deference under Rule 59 in cases involving simple issues with highly disputed facts, than in cases involving complex issues with facts that are not as disputed. *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995). This trial was just that—one with simple issues but highly disputed facts. This court should accord great deference to the Jury’s verdict, and deny both the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial.

II. The Jury’s Verdict Should Stand on the Fourth Amendment Search Claim

In their brief, Plaintiffs properly sets forth the standard for granting a Motion for Judgment Notwithstanding the Verdict, but then ignores the seminal tenets governing JNOV-- that the court must consider all of the evidence in a light most favorable to the non-mover, must draw reasonable inferences favorable to the non-mover, and must not substitute its choice for that

of the jury between conflicting elements in the evidence. The Plaintiff's brief is replete with argument about what the better or more believable evidence was, rather than viewing the evidence in a light most favorable to the defendants, and construing the evidence and drawing all inferences in a way that would support the verdict.

Evidence was presented at trial from which the jury could have concluded that the defendants had substantial experience prior to December 2006 interviewing gang members and using that information to recover illegal guns. The gang members were known to carry illegal guns and use illegal guns in the course of the commission of crime. Hartford was identified as the 7th most dangerous City in the United States as of 2005, and in excess of 60 illegal guns had been recovered during the 12 months prior to December 2006.. The evidence also was undisputed that the defendants knew George Hemmingway to be a high ranking member of the West Hell gang; that Hemmingway was recently in prison on a gun charge; that Hemingway was recently released on parole; that Hemingway was found in possession of heroin on December 20, 2006; that Hemingway sought to help himself by offering to produce illegal guns to the arresting officers; that Hemingway not only had motive to try to help himself by producing 2 illegal guns, but also had motive not to mislead the police officers about the existence and whereabouts of illegal guns; that Hemingway, after indicating he would produce two illegal guns, made a call on a cell phone; that after completing the cell phone call, Hemingway reported to Officer Laureano that the guns were behind 297 Enfield St, in an abandoned car; that Hemingway provided a particularized description of the car: the color was gray, the make was Nissan, and the model was Maxima; that Hemingway provided the specific location of the weapons--beneath front seat; and that Hemingway provided a particularized description of what weapons would be found—2 small caliber handguns.

The defendants testified and the jury could reasonably have found that the Defendants did not know whether the guns were already inside the Maxima, or were being brought there; that guns are moved quickly in the defendants' experience, and that the defendants did not expect the 2 guns referred to by Hemingway to be in the Maxima for long, as they could be removed by another gang member, removed by a person who saw the gang member place the guns in the Maxima, or found accidentally by someone from the neighborhood. Finally, the jury could reasonably have found that the yard at 297 Enfield St was surrounded by private property on 3 sides, and could not easily be cordoned off while a warrant was sought to search for an abandoned car with guns; and that the intrusion associated with a cordoning off of the plaintiffs property would be far greater than the quick entry along the north side of the plaintiffs house for look at the rear yard at 297 Enfield St.

A. Probable Cause and Exigent Circumstances Existed that Eliminated the Need for a Warrant

The warrant requirement of the Fourth Amendment guarantees the fundamental right to be free from government intrusion into an area where an individual has a reasonable expectation of privacy. Payton v. N.Y., 445 U.S. 573, 85-86, 89-90 (1980). However, it is well-settled that the warrant requirement must yield in those situations where exigent circumstances demand that law enforcement agents act without delay. See Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-99.

A district court's determination as to whether exigent circumstances existed is fact-specific, and will not be reversed on appeal unless clearly erroneous. United States v. Cattouse, 846 F.2d 144, 146 (2d Cir. 1988). The test for determining whether a warrantless search is justified by exigent circumstances is an objective one that turns on the district court's

examination of the totality of the circumstances confronting law enforcement agents in the particular case. United States v. MacDonald, 916 F.2d 766, 769 (2d Cir. 1990); United States v. Zabare, 871, F.2d 282, 290-91 (2d Cir. 1989); United States v. Miles, 889 F.2d 382, 383 (2d Cir. 1989).

Exigent circumstances come in several forms, such as a need to enter a protected area to prevent harm to an individual, Brigham City, Utah v. Stuart, 547 U.S. 398 (2006), to enter a protected area to prevent the destruction or removal of evidence, United States v. Gallo-Roman, 816 F.2d 76 (2d Cir. 1987), or to enter a protected area while in hot pursuit of a fleeing suspect, Welsh v. Wisconsin, 466 U.S. 740 (1984).

In the case of exigency based on the destruction of evidence, an officer must have probable cause to believe that the evidence can be found at the location to be searched as well as an urgent need to take action. Gallo-Roman, 816 F.2d at 79; United States v. Martinez-Gonzalez, 686 F.2d 93, 100 (2d Cir. 1982); United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978). To guide this determination, the Second Circuit Court of Appeals has adopted the factors set out in Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970), as guideposts intended to facilitate the district court's determination. MacDonald, 916 F.2d at 769. The Dorman factors may be summarized as follows: 1) the gravity or violent nature of the offense with which the suspect is to be charged; 2) whether the suspect is reasonably believed to be armed; 3) a clear showing of probable cause to believe the suspect committed the crime; 4) strong reason to believe that the suspect is in the premises being entered; 5) a likelihood that the suspect will escape if not swiftly apprehended; and 6) the peaceful circumstances of the entry. These factors are not intended as an exhaustive list, but rather merely an illustrative sampling of the kinds of facts to be taken into account. Id. at 770.

The Dorman factors, although informative, are not directly applicable to recovery of property scenarios because there is no specific suspect of interest to the law enforcement officers. Rather, in this situation, the law enforcement officers preemptively sought to confiscate the evidence of illegal weapons before anyone else had the opportunity to do so. Nevertheless, the requirements of establishing probable cause and exigency that the evidence would be taken or destroyed should remain unchanged.

1. Probable Cause to Believe the Illegal Guns were Located at 297 Enfield Street

Probable cause exists where the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a reasonable man of ordinary caution to conclude that a crime has been, or is being, committed. Brinegar v. United States, 338 U.S. 160, 175-76 (1949). Probable cause is a practical, non-technical conception. Id. at 176.

a. Establishing Probable Cause Through Third Party Information

Probable cause may be established through information provided by a third party to a law enforcement officer. Ill. v. Gates, 462 U.S. 213, 228-29 (1983). The adequacy of a third party's information in establishing probable cause must be evaluated based on the totality of the circumstances. Id. at 230-31; United States v. Steppello, 664 F.3d 359, 363-64 (2d Cir. 2011). In Steppello, the police, in the lawful execution of a search warrant, apprehended an individual named Szuba, who agreed to cooperate with the police by identifying his cocaine dealer. 664 F.3d at 361. The officers had Szuba call his cocaine dealer and arrange a purchase. Id. The officers could not hear what the person on the other end of the telephone was saying to Szuba, but Szuba said he arranged a buy that would occur in twenty minutes. Id. The police hid at the location where the buy was to take place and apprehended Szuba's cocaine dealer—the

defendant—who arrived twenty minutes later. Id. at 362. The district court held that the officers did not have probable cause to conduct the arrest, however this judgment was overruled by the Second Circuit Court of Appeals. Id. at 363, 366. The Court of Appeals held that the district court failed to examine the totality of the circumstances and that the district court failed to evaluate the facts in light of the training and experience of the arresting agents. Id. at 366. The court of appeals believed that the district court erred in discounting the information provided by Szuba simply because he had no proven record of truthfulness or accuracy. Steppello, 664 F.3d at 365. The court recognized that criminals caught red-handed may be reliable sources of information because they seek to cooperate in order to obtain leniency in the charges brought against them. Id. at 366. Furthermore, Szuba was considered reliable because he disclosed the information while face-to-face with the police, rather than anonymously through a letter or phone tip. Id. at 361; see Gates, 462 U.S. at 227 (holding that an anonymous letter, without more, would not support a showing of probable cause). The fact that Szuba was face-to-face with the police tends to establish his reliability because if the information does not check out, the police know exactly who to ask about the false information. Steppello, 664 F.3d at 365. The court also found significance in the fact that Szuba provided detailed information to the police, predicting exactly what the defendant would do and when he would do it, as well as describing the defendant's house and car. Id. at 366; see also United States v. Gagnon, 373 F.3d 230, 237-238 (2d Cir. 2004) (finding sufficient evidence to support probable cause where informant with no history of reliability disclosed information, with specific details, face-to-face with officers regarding a crime he was a part of). But see, United States v. Clark, 638 F.3d 89, 96-97 (2d Cir. 2011) (finding insufficient evidence to support probable cause to search an entire multi-unit

dwelling where informant with no history of reliability made the bare, conclusory statement to officers that the unit was in the defendant's "full control").

b. Establishing Probable Cause Through an Officer's Past Experience

An officer's past experience with criminal behavior and training in combating crime may be considered to establish probable cause. See United States v. Delossantos, 536 F.3d 155, 161 (2d Cir. 2008); United States v. Gaskin, 364 F.3d 438, 457 (2d Cir. 2004). In Delossantos, the court held that there was sufficient evidence to support probable cause to arrest a man who drove a drug dealer to and from drug deals when considering the officers' expertise in the type of situation. 536 F.3d at 160. The court noted that "[s]ome patterns of behavior which may seem innocuous enough to the untrained eye may not appear so innocent to the trained police officer who has witnessed similar scenarios numerous times before. As long as the elements of the pattern are specific and articulable, the powers of observation of an officer with superior training and experience should not be disregarded." Id. at 161. Similarly, in Gaskin, the court found sufficient evidence to support probable cause to search defendant's car where officers knew defendant was a known drug dealer and had been arrested with, among other things, \$3,895 in cash on his person. 364 F.3d at 457. The court recognized that experience and training may allow a law enforcement officer to discern probable cause from facts and circumstances where a layman might not. Id. at 457; see also United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987) (holding that DEA agent with experience in drug trafficking interdiction and first hand knowledge of defendant's drug trafficking was sufficient basis for probable cause to search defendant's residence); United States v. Price, 599 F.2d 494, 501 (2d Cir. 1979) (finding sufficient evidence to support reasonable suspicion for a stop conducted by a DEA official with six years experience of a defendant who appeared nervous in the airport, carried unmarked

luggage, and continually scanned the faces of the people in the terminal); United States v. Granderson, 182 F. Supp. 2d 315, 320, 324 (W.D. N.Y. 2001) (finding that police officer with knowledge of the area had sufficient evidence to establish probable cause to search for drugs when defendant exchanged money and a zip-lock baggie with another).

2. Urgent Need to Act Without First Obtaining a Warrant

The exigent circumstances exception to the warrant requirement requires an objectively reasonable belief that entry is necessary to prevent the consequences of the exigency. See United States v. Klump, 536 F.3d 113, 118 (2d Cir. 2008) (smell of smoke outside warehouse justified warrantless entry into the warehouse to determine if there was a fire); Brigham City, 547 U.S. at 406 (officers who saw a fight in the kitchen of a home were justified in a warrantless entry into the home to break up a fight); MacDonald, 916 F.2d at 770 (warrantless entry into the home of known drug dealer was justified to prevent destruction of evidence); Zabare, 871 F.2d at 290 (warrantless entry into drug dealer's residence was justified to prevent destruction of evidence). To determine whether an officer's belief of urgent need is objectively reasonable, the court must examine the totality of the circumstances confronting law enforcement agents in the particular situation. MacDonald, 916 F.2d at 769. The Dorman factors provide relevant guideposts for this determination, however, they are not meant to provide an exclusive list of factors to consider. Id. at 770.

a. Establishing Urgency Through an Officer's Past Experience

Among the factors to be considered that are not expressly recognized in Dorman is the law enforcement officer's prior experience with the particular type of situation. Klump, 536 F.3d at 118; United States v. Talkington, 843 F.2d 1041, 1044 (7th Cir. 1988) ("In determining whether agents reasonably feared destruction, appropriate inquiry is whether the facts...would lead

reasonable experienced agents to believe that evidence might be destroyed.”); United States v. Timberlake, 896 F.2d 592, 596 (D.C. Cir. 1990) (determining urgent need focuses on what a reasonable experienced police officer would believe). In Zabare, defendant sold counterfeit tickets to public amusement events. 871 F.2d at 284-86. FBI agents set up a sting operation where they sold counterfeit tickets to the defendant. Id. The tickets were marked “void” in case the defendant attempted to sell the tickets to unsuspecting customers. Id. The agents believed that the defendant would destroy the tickets when he saw they were marked “void” and all other evidence of his unlawful activity and thus, the agents entered the defendant’s home to arrest him without a warrant. Id. The court held that this warrantless entry was justifiable on the basis that destruction of evidence was imminent and there was no time to secure an arrest warrant. Id. at 292. The court noted that if an experienced officer reasonably believes that those inside a residence are likely to be alarmed and destroy evidence, then a warrantless intrusion is justified, even if it eventually develops that the residence was unoccupied or those inside residence had no intention of destroying any contraband. Id. In Gallo-Roman, the defendant attempted to transport cocaine hidden in a photograph frame’s false back. 816 F.2d at 78-79. The DEA intercepted the mail and replaced the cocaine with a mixture of cocaine and dextrose before forwarding them to the defendant. Id. The agents apprehended the defendant in his home without a warrant after he picked the packages up from the post office. Id. The court held that the agent’s belief that the defendant would recognize the packages had been tampered with and destroy the evidence justified the agent’s warrantless entry into the defendant’s home. Id. at 79; see Zabare, 871 F.2d at 291; Gallo-Roman, 816F.2d at 79-80.

b. Establishing Urgency Through the Time Necessary to Obtain a Warrant

Another factor to be considered in the urgency determination is the effect the delay necessary to obtain a warrant would have on the police activity. Dorman, 435 F.2d at 394. The fact that a delay may be encountered is not controlling on whether a warrant is required; securing a warrant always involves some additional time. Chappell v. United States, 342 F.2d 935, 938 (1965). The Supreme Court of the United States held that mere convenience or saving time will not justify a warrantless search and that some element of emergency must exist that would render the search ineffective if delayed by the time necessary to obtain a warrant. Camara v. Mun. Court & Cnty. of S.F., 387 U.S. 523, 533 (1967); see Mich. v. Tyler, 436 U.S. 499, 509 (1978) (“[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action *and no time to secure a warrant*,” such as entry into burning building (emphasis added)). In Dorman, the fact that it was late at night and the Justice who had been assigned to issue warrants could not be reached was significant to determining that exigent circumstances were present. 435 F.2d at 394-95. That court noted the difficulty in obtaining warrants late at night or early in the morning before the start of a normal working day. Id. at 395; see also United States v. Farra, 725 F.2d 197, 197-99 (2d Cir. 1984) (warrantless entry into hotel room was permitted because obtaining a warrant in the middle of the night may have led to destruction of evidence); Campbell, 581 F.2d at 26-27 (warrant did not need to be obtained where the process would take several hours and the evidence may be destroyed); United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir. 1988) (holding that the time necessary to obtain a warrant is an important consideration and that three hours was too long of a delay to require a warrant, especially when the defendants may have been aware of the police activity). In many cases, destruction of evidence, particularly a stash of drugs, will occur in a shorter period of time than is required to obtain a warrant. See Zabare, 871 F.2d at 292; Aquino, 836

F.2d at 1273. In such situations, requiring the law enforcement officers to obtain a warrant would unduly burden the police force and lead to the destruction of probative evidence that could be used against individuals for which there is probable cause for an arrest. See Zabare, 871 F.2d at 292; Aquino, 836 F.2d at 1273.

In the case at bar, the jury was properly instructed that probable cause could be established through information provided by a criminal suspect with no track record of reliability, provided there were articulable facts showing the information is worthy of belief and was obtained in a reliable way. In addition the jury was properly charged that in order to establish probable cause to search the plaintiff's property the facts available at the time of the search must permit a police officer of reasonable caution to believe a search is appropriate. Furthermore, the jury was instructed that an officer's experience and expertise may be relevant to whether probable cause is present, in that his training may permit him to draw reasonable inferences about criminal activity when a layman could not do so. Finally, the jury was instructed that the determination of probable cause must be determined in light of the totality of circumstances, including whether it was objectively reasonable for the defendant officers to conclude that Mr. Hemingway was telling the truth and had a reliable basis for his information.

The jury was certainly justified in concluding that the defendants knew George Hemmingway to be a high ranking member of the West Hell gang; that Hemmingway was recently in prison on a gun charge; that Hemmingway was recently released on parole; that Hemmingway was found in possession of heroin on December 20, 2006; that Hemmingway sought to help himself by offering to produce illegal guns to the arresting officers; that Hemmingway not only had motive to try to help himself by producing 2 illegal guns, but also had motive not to mislead the police officers about the existence and whereabouts of illegal guns; that

Hemingway, after indicating he would produce two illegal guns, made a call on a cell phone; that after completing the cell phone call, Hemingway reported to Officer Laureano that the guns were behind 297 Enfield St, in an abandoned car; that Hemingway provided a particularized description of the car: the color was gray, the make was Nissan, and the model was Maxima; that Hemingway provided the specific location of the weapons--beneath front seat; and that Hemingway provided a particularized description of what weapons would be found—2 small caliber handguns. The jury was further justified in concluding that the Defendants did not know whether the guns were already inside the Maxima, or were being brought there; that guns are moved quickly in the defendants' experience, and that the defendants did not expect, based on their experience in the Northeast Conditions Unit and expertise in dealing with gang members and illegal guns, the 2 guns referred to by Hemingway to be in the Maxima for long, as they could be removed by another gang member, removed by a person who saw the gang member place the guns in the Maxima, or found accidentally by someone from the neighborhood. Based on the above facts, it certainly was reasonable for a police officer with the experience and expertise of the defendants to conclude that George Hemingway was telling the truth and had a reliable basis for his information; and that there were two illegal guns in an abandoned car behind 297 Enfield St.

Furthermore the above facts support a jury finding that unless the defendants conducted an immediate warrantless search of the plaintiffs property the handguns would likely be removed. The alternative would be to attempt to secure the parcel of property owned by the plaintiffs while a warrant was prepared, reviewed by both prosecuting and judicial authorities, and brought to the scene. The plaintiffs property is, and in December 2006 was, surrounded on 3 sides by privately owned parcels, making it impossible to cordon off the plaintiffs property

without committing a greater intrusion than the planned search itself. Under such a scenario the plaintiffs would have to be evacuated from their home and barred from entry onto the property for a preservation of the status quo until a warrant arrived.

There certainly was evidence properly before the jury, when viewed in a light favorable to the defendants and with all inferences drawn in favor of supporting the verdict, that there was a likelihood that the opportunity to recover the two illegal guns would be lost if not searched for promptly. It is rare, if ever, that a police officer has eyewitness personal knowledge of imminent destruction of evidence. The police officers who enter dwellings to prevent the destruction of narcotics evidence do not visualize, nor do they have to, the imminent flushing of narcotics down a toilet before entering pursuant to the exigent circumstances exception to the warrant requirement. Their experience and expertise tells them such destruction is imminent. Similarly, the defendants did not have to visualize two guns about to be removed or destroyed in order to know based on experience and expertise that the guns would not be behind 297 Enfield St. for long. Viewing the facts in a light most favorable to the defendants, including drawing all inferences in a way that supports the verdict, the plaintiffs Motion for Judgment Notwithstanding the Verdict and Motion for New Trial should be denied.

III. The Defendants did not Enter the Plaintiff's Curtilage

- a. Evidence at trial shows no reasonable expectation of privacy in the area entered by the defendants.**

The jury certainly was justified in finding that the defendants entered the front yard of the Plaintiff's property and then moved along the north side of the Plaintiff's house to the rear corner before retreating when the Plaintiff's dog was spotted. Plaintiff Glenn Harris acknowledged that strangers could walk to his front door without his objection, and Plaintiffs counsel conceded at argument that the front walk and door area was not curtilage. The side of the plaintiffs home was only a few feet to the north of this front door area. Also undisputed was the fact that the officers did not have to climb a fence or breach any other type of barrier in order to reach the rear corner of the plaintiffs house. This point is confirmed by the testimony that nothing prevented the plaintiff's dog from running from the rear of the yard, around the north side of the house to the front yard, and onto the driveway and even out into the street. It was undisputed that the area entered by the police was within full view of someone standing on the public sidewalk. Plaintiff Glenn Harris admitted that he did nothing to attempt to obscure this area from view from the public sidewalk. Plaintiff Glen Harris also admitted there was no idicia of an expectation of privacy in this area, such as a patio a chair, personal belongings, toys, tools or anything else. The photographs in evidence show that the strip of land on the north side of the house was only a few feet wide, and had no objects on it that might have been a clue to a reasonable police officer that the plaintiff had an expectation that this area of his yard would be under the same umbrella of protection as the interior of his home. Case law discussed below demonstrates that the land entered upon by the defendants, under the facts and circumstances then and there availing, was not curtilage.

1. The Constitutional Elements of the Curtilage

In Katz v. United States, 389 U.S. 347, 351 (1967), the Court held that the Fourth Amendment protects people, not places. From this, it follows that the Fourth Amendment applies only where an individual has an expectation of privacy that society recognizes as legitimate. Id. at 361 (Harlan, J., concurring). For example, the Fourth Amendment generally applies to an individual's private activities conducted in the sanctity of the home, where an individual clearly has an expectation of privacy, yet provides no protection in the open fields on an individual's property, where an expectation of privacy is not considered reasonable. In between these two extremes falls the curtilage, which is the area outside the home that is afforded Fourth Amendment protection against unreasonable searches and seizures. The analysis for determining the applicability of the Fourth Amendment in these situations remains unchanged: the individual must have a reasonable expectation of privacy.

The analysis for determining whether a reasonable expectation of privacy existed for areas outside of the home was established in United States v. Dunn, 480 U.S. 294, 301 (1987). The Court in Dunn believed that curtilage should be determined with particular reference four factors: 1) the proximity of the area claimed to be curtilage to the home; 2) whether the area is included within an enclosure surrounding the home; 3) the nature of the uses to which the area is put; and 4) the steps taken by the resident to protect the area from observation by people passing by. Id. The Court warned that combining these four factors does not produce a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Id. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of

Fourth Amendment Protection. Id. The touchstone of the inquiry is whether the defendant had a reasonable expectation of privacy in the area in question. United States v. Reilly, 76 F.3d 1271, 1276 (2d Cir. 1996). It follows from this that areas of a plaintiff's land knowingly exposed to the public are not protected by the Fourth Amendment. California v. Ciraolo, 476 U.S. 207, 213 (1986); Katz, 389 U.S. at 351-52 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.")

a. Proximity of the Area to the Home

There is no fixed distance that may be applied to determine where the curtilage ends and where the open field begins. Hart v. Myers, 183 F. Supp. 2d 512, 522-23 (D. Conn. 2002). Rather, the extent of the curtilage must be determined on a case by case basis. Id. Simply because an area is close in proximity to the home does not automatically mandate that area be considered curtilage. United States v. Hogan, 122 F. Supp. 2d 358, 362 (E.D. N.Y. 2000) (holding that police entry onto a driveway to conduct warrantless dog sniff did not implicate the Fourth Amendment despite the fact that the physical proximity of the driveway was very close to the house). In United States v. Cousins, 455 F.3d 1116, 1119-20 (10th Cir. 2006), the police entered the defendant's side yard which was immediately adjacent to the defendant's home in order to corroborate a tip provided by an electric company worker who was just at the home. Id. at 1119. From that position, the police looked through three holes in a gate into the backyard to find marijuana plants being grown. Id. The court held that, despite the officer's proximity to the home, their location was not considered curtilage and thus was not protected by the Fourth Amendment. Id. at 1122. The curtilage may extend further in rural settings than urban settings. Reilly, 76 F.3d at 1277; see United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980) ("[I]t is

doubtful that the curtilage concept has much applicability to multifamily dwellings...”); Commonwealth v. Thomas, 267 N.E.2d 489, 491 (Mass. 1971) (“In a modern urban multifamily apartment house, the area within the “curtilage” is necessarily much more limited than in the case of a rural dwelling subject to one owner’s control....In such an apartment house, a tenant’s “dwelling” cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control.”); see also United States v. Agapito, 620 F.2d 324, 331 (2d. Cir. 1980) (holding that no Fourth Amendment violation occurred where police pressed their ear to a shared door). The urban-rural setting distinction is consonant with the Court’s statements in Katz, that the Fourth Amendment protects people, not places. See 389 U.S. at 351. Thus, in a rural setting, an individual may have a reasonable expectation of privacy in areas that are further from the home because buildings and neighbors are more spread out. See Reilly, 76 F.3d at 1277 (holding that the defendant had a reasonable expectation of privacy in a cottage located 375 feet away from the main residence). On the other hand, in an urban setting, an individual’s expectation of privacy may not extend beyond his or her apartment unit because buildings are close to one another and neighbors are abundant. See Arboleda, 633 F.2d at 992 (holding that the defendant had no reasonable expectation of privacy in a fire escape for a multi-unit residential building). The rationale underlying this distinction is that there can be no reasonable expectation of privacy in that which is exposed to third parties, regardless of whether it is information being disclosed or an area of land being exposed. See California v. Greenwood, 486 U.S. 35, 40 (1988) (holding that there is no reasonable expectation of privacy in garbage placed at the side of the road for garbage collectors to pick up); Smith v. Maryland, 442 U.S. 735, 742 (1979) (holding that there is no reasonable expectation of privacy in phone numbers conveyed to the telephone company); United States v. Hoffa, 385 U.S. 293, 302-303 (1966)

(holding that Fourth Amendment protection does not apply to an individual's misplaced confidence in another individual).

b. Presence of an Enclosure Surrounding the Area and the Home

In many cases, a fence may be relevant to establish an individual's expectation of privacy. Dunn, 480 U.S. at 301. However, the relevance is only in the fact that a fence tends to exclude an individual from a particular area. See Hogan, 122 F. Supp. 2d at 362; People v. Lieng, 190 Cal. App. 4th 1213, 1225 (2011); State v. Loomis, 436 So. 2d 1103, 1104 (Fla. Dist. Ct. App. 1983). If a fence exists, but does not obscure others' sight of the area sought to be protected, it is unreasonable for an individual to believe he or she has an expectation of privacy in that area. See Loomis, 436 So. 2d at 1104 (holding that three and one-half to four foot high chain-link fence running around the sides of the yard was insufficient to establish an expectation of privacy). It is not true that all fences must be tall stockade fences in order to establish an expectation of privacy that is reasonable. A fence, despite being see-through, may nonetheless be effective in keeping individuals out of a particular area. Thus, fences tend to be relevant to the expectation of privacy analysis in rural settings, where a large area may be fenced off and the entire area may not be visible to an outsider standing at the perimeter of the fence. In such situations, it is reasonable for an individual to have an expectation of privacy in an area that is fenced in and not visible to an individual standing at the perimeter of the fence. However, in an urban setting, it is likely for the area being fenced in to be entirely visible to an outsider standing at the perimeter of the fence. In such cases, it is unreasonable for the existence of a fence to establish an expectation of privacy in a particular area. In Hogan, a dilapidated stockade fence extended from the side of the house and ran through the area behind the house, however, the front of the house was not enclosed. 122 F. Supp. 2d at 362. The court ruled in this case that the

police entering the driveway and the perimeter of the house did not violate the Fourth Amendment because the area was not curtilage. Id. In Lieng, the agents went through an opening in the fence, which was “probably a gate,” onto the defendant’s property. 190 Cal. App. 4th at 1225. The court held that the agents did not violate the defendant’s Fourth Amendment protection because the area was not considered curtilage, despite the existence of the fence. Id. In Loomis, the court held that the police had not violated the defendant’s Fourth Amendment when the defendant’s property was enclosed by a three and one-half to four foot high chain-link fence around the sides of the yard. 436 So. 2d at 1104. The court did not believe that a fence of this sort created the requisite expectation of privacy necessary for Fourth Amendment protection. Id. But see Brocuglio v. Proulx, 478 F. Supp. 2d 297, 304 (D. Conn. 2007) (holding that defendant had a reasonable expectation of privacy in his entire backyard that was surrounded by a six-foot solid stockade fence that was primarily opaque); State v. Ryder, 301 Conn. 810, 821-22 (2011) (holding that a three-foot high electronic security gate and fence surrounding a home constituted the outer boundary of that home’s curtilage).

c. Nature of the Uses to which the Area is Put

One way to prove that an individual has an expectation of privacy in a particular area is if that individual actually uses that area to engage in conduct that is private. Dunn, 480 U.S. at 301. However, just because an individual engages in private conduct in a particular area does not necessarily mean that the individual’s expectation of privacy is reasonable. See Simko v. Town of Highlands, 276 Fed. Appx. 39, 41 (2d Cir. 2008); Esmont v. City of New York, 371 F. Supp. 2d 202, 212 (E.D.N.Y. 2005); Hogan, 122 F. Supp. 2d at 362; Lieng, 190 Cal. App. 4th at 1224-25. Therefore, this factor is relevant only to establishing a subjective expectation of privacy, and other factors must be considered to determine whether that expectation is reasonable by society’s

standards. In Simko, the court held that the police search of the shed and surrounding area did not constitute curtilage where the structure was clearly meant for dogs and the surrounding area was used as a “poop pit” and thus, was not likely to be used for private home activities. 276 Fed. Appx. at 41. In Esmont, the court held that the entry on to the defendant’s private property was not a Fourth Amendment violation because the defendant presented no evidence that the area was used for intimate activities and thus, it was not considered curtilage. 371 F. Supp. 2d at 212. In Hogan, the court held that the driveway and the area surrounding the house were not part of the curtilage because the area was not used for any purpose other than entrance or egress. 122 F. Supp. 2d at 362. In Lieng, the court held that the driveway was not considered curtilage and was not subject to Fourth Amendment protection because the location was not intimately tied to the home. 190 Cal. App. 4th at 1224-25.

d. Steps Taken to Protect the Area from Observation

Another way to prove that an individual has an expectation of privacy in a particular area is to consider the steps that an individual has taken to protect the area in question from observation by others. Dunn, 480 U.S. at 301. If an individual has taken steps to protect an area from observation, then it is clear that he or she has an expectation of privacy in that area. However, just because the individual has an expectation of privacy does not necessarily make that expectation reasonable. Setting up a fence is considered a step taken to obscure an area from observation. However, even with the purpose to obscure visibility, a chain link fence—which is completely see through—is not a reasonable way to achieve such a goal and thus, the individual’s expectation of privacy under these circumstances would be unreasonable—assuming that the chain link fence allowed the entire fenced in area to be visible. From this, it is clear that an individual has no expectation of privacy in an area that is knowingly exposed to the public.

Katz, 389 U.S. at 351-52; Castanza v. Town of Brookhaven, 700 F. Supp. 2d 277 at 287; Esmont, 371 F. Supp. 2d at 212. In Simko, the court held that the police search of a shed and surrounding yard was not a Fourth Amendment violation because the area was relatively open to exposure to neighboring properties, if not the public at large. 276 Fed. Appx. at 41. In Castanza, the court held that there was no Fourth Amendment violation where town workers entered the defendant's front and side yard to remove litter and other property that the defendant had been ordered to clean up. 700 F. Supp. 2d at 288. In determining whether a Fourth Amendment violation had occurred, the court found significant the fact that the garbage was viewable from the street, which is clearly public, and that a visual observation from a public place is no search at all. Id. at 287. In Esmont, the court held that no Fourth Amendment violation occurred when health workers entered the defendant's property to conduct a compliance inspection, finding significant the fact that the yard was in full view of the streets and rail road tracks. 371 F. Supp. 2d at 212. In United States v. Williams, 219 F. Supp. 2d 346, 360 (W.D.N.Y. 2002), the court held that there is no expectation of privacy in a driveway that is exposed to the public nor is there such an expectation in a vehicle parked in that driveway that was visible from the street. In United States v. Reyes, 283 F.3d 446, 465 (2d Cir. 2002), the court equated accessibility with visibility, holding that driveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants' houses. In United States v. Ventling, 678 F.2d 63, 64, 66 (8th Cir. 1982), the court held that a driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view and thus there can be no reasonable expectation of privacy. In Hogan, the court held that the area surrounding the driveway and house was not curtilage because the area was not obscured from public view. 122 F. Supp. 2d at 362.

In sum, the Fourth Amendment protects people, not places. See Katz, 389 U.S. at 351. The fact that an area is close to the home or even within the home is not determinative of Fourth Amendment protection. Id. The basis for determining when and where the Fourth Amendment applies turns on an analysis of whether the aggrieved individual had a reasonable expectation of privacy in the area searched. Id. at 361 (Harlan, J., concurring). From this, it becomes clear that an individual has no reasonable expectation of privacy in an area that is knowingly exposed to the public, regardless of where that area is. A person living in a single story ranch with a large window that has no blinds or curtains looking into the living room does not provide the individual with expectation of privacy in that room despite the fact that the room is in the “sanctity” of the home. In every case, the standard for Fourth Amendment applicability is a reasonable expectation of privacy. The reason for the Dunn factors is to inform the expectation of privacy analysis in regard to the area surrounding the home. The factors are not exclusive, nor is any single factor dispositive. Each factor is relevant only to the extent that it informs the expectation of privacy analysis.

The Dunn factors weigh heavily against a finding of curtilage. The area where the defendants entered admittedly was adjacent to the plaintiff’s home. However, this area was not enclosed by a fence; it was in full view from the street; it was immediately adjacent to a part of the property that plaintiff concedes was not curtilage; and there was no indicia of it being used for private leisure or gatherings, such as a chair, a table, a grill, a toy, a piece of sporting equipment, or similar personal use item. Accordingly, the Plaintiffs Motion for Judgment Notwithstanding the Verdict and Motion for New Trial should be denied.

IV. The Defendants are not liable for Damages to the Plaintiff.

As the defendants have no liability on any of the claims asserted by plaintiff, either deriving from the jury's verdict or from any decision on a post trial motion, the defendants owe plaintiff no damages. Plaintiffs attempt to argue that the minor plaintiffs witnessing of the killing of the her dog was proximately caused by the entry into the plaintiffs curtilage without a warrant. First, that is a factual scenario that was specifically presented to and rejected by the jury. That finding is not challenged by plaintiffs in a post trial motion and is certainly not assailable on appeal, given that it is a factual finding for which there was ample probative evidence. Second, it is easily outside the scope of proximate causation that the entry onto the plaintiffs side yard would lead to an encounter with a dog who was not fenced in, not on a leash, and not under the control of an owner; that the dog would charge the two officers; that the officers could not escape the dog despite best efforts to retreat, and that the dog would lunge at one of the officers, requiring the officer to kill the dog in self defense. Even more improbable is the minor plaintiff being in the area to call out that he officer should not shoot her dog. Accordingly, the Defendants are not liable for damages to the Plaintiffs.

V. The Plaintiff is Not Entitled to Judgment Notwithstanding the Verdict for Common Law Trespass.

The Plaintiffs are not entitled to a Judgment Notwithstanding the Verdict as to the Trespass claim. Case law is clear that a policeman who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is a licensee. City of Bristol v.. Tilcon Minerals, Inc., 284 Conn. 55, 87 (2007); 38 Am.Jur., Negligence, s 124; 2 Harper &

James, Torts s 27.14 n. 21; U.S. v. St. Clair, 240 F.Supp. 338 (D.C.N.Y. 1965); Roberts v. Rosenblatt, 146 Conn. 110 (1959); Haffey v. Lemieux, 154 Conn. 185 (1966); Wroniak v. Ayala, Superior Court, judicial district of Hartford, Docket No. 94 0544499 (June 13, 1995, Sheldon, J.); Furstein v. Hill, 218 Conn. 610, 615 (1991); State v. Plummer, 241 A.2d 198 (1967); State of Connecticut v. Alexander, Superior Court of Connecticut, Judicial District of Fairfield. No. CR060215063 (June 3, 2008, Hauser, J.) There is no dispute that the defendants were on the plaintiffs property on official police business—attempting to recover 2 illegal guns and remove them from the neighborhood. This makes the defendants licensee’s and defeats the plaintiffs Motion for Judgment as a Matter of Law. Finally, although not sought, the official nature of the Defendants actions easily defeats a Motion for New Trial.

VI. There is no Basis for a New Trial as to any of the Remaining Claims

The jury certainly rejected the factual version offered by the plaintiffs as to Defendant O’Hare’s actions immediately prior to killing the Plaintiffs’ dog. As such, Plaintiffs’ Due Process claim failed and there is no basis whatsoever upon which to join it with the plaintiffs’ request for Judgment Notwithstanding the Verdict or for New Trial. Whether the subject property was curtilage and, if so, whether probable cause and exigent circumstances existed that justified entry into the curtilage are distinct issues from whether Defendant O’Hare heard the minor plaintiff call to him not to shoot her dog, and thereafter fired a fatal shot into a non-aggressives animal. The issues surrounding defendant O’Hare’s actions just prior to shooting the dog have been decided by the jury in the Defendants favor, and are not subject to a new trial. As previously noted, a party may be entitled to a new trial when the jury’s verdict is “seriously erroneous” or where it results in a miscarriage of justice.

VII Conclusion

For the reasons set forth above, the Plaintiffs’ Motion for Judgment Notwithstanding the

Verdict and Motion for New Trial should be denied.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde
Thomas R. Gerarde
ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on **July 16, 2012**, a copy of the foregoing **Memo in Opposition to Plaintiff's Motions for Judgment** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Thomas R. Gerarde
Thomas R. Gerarde

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	JULY 16, 2012

**REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RENEWED
MOTION FOR JUDGMENT AS A MATTER OF LAW**

**I. The Defendants are entitled to File a Renewed Motion for Judgment as a
Matter of Law Based on Qualified Immunity**

Plaintiffs argue that the Defendants can not file a renewed Motion for Judgment pursuant to Fed. R. Civ. P. 50 (b) because the jury returned a verdict in their favor on all counts. Rule 50, however, does not discriminate between Plaintiffs and Defendants, nor between prevailing parties and non-prevailing parties. A Rule 50 motion may be made by any party, and may be made as to both a Plaintiff's claims and a Defendant's defenses. Ross v. Rhodes Furniture, Inc., 146 F.3d 1286, 1289-90 (11th Cir 1998); Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp., 51 F. 3d 12291236 (4th Cir 1995). Furthermore, Rule 50(b) entitles any party who has made a motion under Rule 50(a) to renew that motion within 28 days of the entry of judgment. See Fed.R.civ.P. 50(b). Upon filing the renewed motion the court is authorized, inter alia, to allow the judgment to stand or to direct the entry of judgment as a matter of law. See Fed.R.Civ.P. 50(b)(1),(3).

The allowance of the Defendants motion pursuant to Rule 50(b) is the only way the defendants can have their day in court on their defense of Qualified Immunity, which was not determined by the jury. If the Court determines that the Defendants' Rule 50(b) is moot because the Court has decided to deny the Plaintiffs post-trial motions, that would be one possible scenario. However, in the event the court is inclined to grant either of the plaintiffs post trial motions a ruling on the defendants Rule 50(b) motion would be required so the qualified immunity issue will have been determined by the Court, which reserved the qualified immunity issue to itself.

II. The Caselaw cited by the Defendants in their Main Brief Demonstrates the Defendants are Entitled to Qualified Immunity

Plaintiffs argue that the Defendants' brief in support of their claim for Qualified Immunity reads too much like a horn book and contains little argument. The compilation of case law, however, is the best argument for qualified immunity because it demonstrates that it was not clearly established as of December 2006 that an entry into the plaintiffs side yard would constitute an invasion of curtilage. United States v. Dunn 480 U.S. 294, 301 (1987) was still good case law as of December 2006. Thus, reasonable police officers could conclude that although the area in question was adjacent to the plaintiffs home, it was not enclosed by a fence or other barrier, and no steps had been taken to protect the area from public view.; furthermore, reasonable police officers could conclude plaintiff did not put the area to use in a way that suggested an expectation of privacy—particularly in light of the fact that the area was not only wide open to public view, but also was in full view from more than 10 windows on the side of a neighbor's house. California v. Ciralto's

holding that land knowingly exposed to the public is not protected by the Fourth Amendment is also supportive of a finding that the subject area was not curtilage. See 476 U.S. 207, 213 (1986). The fact that the District court in Brocuglio v. Proulx, 478 F.Supp 297, 304 (D. Conn 2007) found the area enclosed behind a 6 foot tall opaque fence, does not put a reasonable police officer on notice that entry into an unenclosed side yard in full view of someone standing on the sidewalk is also curtilage. Furthermore, the fact that the Connecticut Supreme Court in State v. Ryder, 301 Conn 810, 821 (2011) determined that the police climbing over a fence that fully enclosed a plaintiffs yard was entry into curtilage does not tell a reasonable police officer that walking through a front yard and around the side of a house without climbing or stepping over anything constitutes entry into curtilage. All of the other cases cited in the main brief, viewed as an existing body of case law, do not tell a reasonable police officer that entry into the Plaintiff's side yard constituted entry into curtilage. Accordingly, judgment based on qualified immunity should enter.

Similarly, reasonable police officers in December 2006 would know (1) that probable cause is looked at based on the totality of circumstances, and that it can be based on third party information. Illinois v. Gates, 462 U.S. 213 (1983); (2) that they can rely on past experience when making the probable cause determination United States v. Delossantos, 536 F. 3d 155 (2d Cir. 2008); U.S. v. Gaskin, 364 F.3d 438, 457 (2d cir. 2004); (3) that urgency can be established through past experience, United States v. Gallo-Roman, 816 F.3d 76 (2d Cir 1987); (4) that urgency can be found based on the time necessary to file appropriate paperwork and obtain a search warrant at the person in possession. Dorman v. United States, 435 F. 2d

385, 394 (D.C.Cir 1970); that the Community Caretaker exception applied to urgent situations where the police are not looking to recover evidence or build a case against an individual, but to safeguard one or more persons from harm. Cady v. Dombrowski, 413 U.S. 433 (1973)

The above cases, and all of the other case law cited in the main brief, establish that reasonable police officers could conclude that entry into the Plaintiffs' side yard, even if assumed to be curtilage, was authorized by the exigent circumstances exception to the warrant requirement. Accordingly, judgment should enter for the defendants based on qualified immunity.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Thomas R. Gerarde

Thomas R. Gerarde
ct05640
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: tgerarde@hl-law.com

CERTIFICATION

This is to certify that on **July 16, 2012**, a copy of the foregoing **Reply Memo in Support of Defendant's Renewed Motions for Judgment** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Thomas R. Gerarde
Thomas R. Gerarde

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn

Jon L. Schoenhorn

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

the plaintiff's motion for judgment as a matter of a law. The defendants' attempt to make up arguments and facts that either are irrelevant or non-existent does not create a dispute.¹

II. THE WARRANTLESS ENTRY AND SEARCH OF THE PLAINTIFF'S PROPERTY VIOLATED THE FEDERAL PROHIBITIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES

A. The Defendants Possessed No Probable Cause to Search and the Exigency Exception to the Warrant Requirement Did Not Apply

In response to the plaintiff's assertion that the defendants possessed no probable cause to search the plaintiff's yard, that a warrant was required in order to search, and that no exigent circumstances existed to justify the warrantless entry and search, the defendants reiterate the language they already set forth in their memorandum in support of their motion for judgment as a matter of law. (Doc. No. 116). The defendants concede that probable cause *was required* in this case, but fail to establish that there was, in fact, any probable cause. (*Id.* at 12-13). Moreover, the defendants continue to ignore the difference between the exigent circumstances and emergency circumstances exceptions to the warrant requirement that the plaintiff previously has set out in detail. (Doc. Nos. 117-1 and 119-1). They fail to address the difference between the "emergency doctrine," which is a component of the police's community caretaking function unrelated to criminal investigations, and therefore, unrelated to warrants, and the "exigent circumstances exception" to the warrant requirement. (*See* Doc. 119-1). Neither rule is applicable in this case and the defendants' objection to the plaintiff's motion for judgment as a matter of law and for a new trial does not provide any evidence to the contrary.

In addition, the defendants' insistence that their reliance on the "tip" Officer Laureano

¹ For example, the defendants maintain that the jury could have concluded that Hartford was identified as the seventh most dangerous city in the United States. However, that "fact" was not established at trial; it only was allowed into evidence, over plaintiff's objection, to demonstrate the defendants' state of mind that Hartford was a dangerous city. The plaintiff has submitted documentation in footnote 4 of his opening memorandum that in 2006, Hartford was the 34th most dangerous city. Regardless, it is irrelevant, since this is not a police state and the constitution applies even in "dangerous" cities.

received from George Hemingway, a convicted felon on parole, was reasonable, has no basis either in the law or in the facts at trial. The defendants argue that Hemingway, who was found in possession of heroin but curiously not placed under arrest, had no motive to mislead the police officers and that he was more “reliable” than most people because he is a criminal and a gang member. The defendants cite to *United States v. Stepello*, 664 F.3d 359 (2d Cir. 2011) and *United States v. Gagnon*, 373 F.3d 230 (2d Cir. 2004) to support this specious argument, but neither case stands for that proposition. Unlike here, the criminal informants’ information in those cases was corroborated by the police *before* it was acted upon. In addition, the information given directly was related to the crime each informant was committing when they were arrested and relayed information to the police. In *United States v. Stepello*, the information provided by the informant was “specific and corroborated. For example, [the informant] predicted just what [the defendant] would do in response to his cryptic phone call . . . and [the informant] also accurately described [the defendant’s] residence and type of vehicle he drove.” *Id.* at 366. Notably, the defendants also misquote *Stepello* in their memorandum. They claim that the Court in *Stepello* “recognized that criminals caught red-handed may be reliable sources of information because they seek to cooperate in order to obtain leniency.” (Doc. 120, p.7). However, what the Court actually said is this:

There is, in particular, no need to show past reliability when the informant is in fact a participant *in the very crime at issue*. However, although other circuits have recognized that criminals caught red-handed may be reliable sources of information because [t]he informant’s interest in obtaining leniency creat[es] a strong motive to supply accurate information, we have also cautioned that a *criminal informer is less reliable than an innocent bystander with no apparent motive to falsify*.

Id. at 365 (emphasis added). Thus, *Stepello* stands for the opposite proposition claimed by the defendants. Similarly, in *Gagnon*, *supra*, the Court found the criminal informant’s information reliable, not only because he was believed to be a participant *in the crime at issue* and gave the information to the authorities face-to-face, but because the information was “specific and it was

corroborated, almost entirely, by the Officers prior to the search.” *Id.* at 237-38. Thus, even though the Second Circuit determined that the criminals’ specific information in *Stepello* and *Gagnon* was reliable, the Court *never* stated that criminal informants inherently are more reliable than others. The defendants’ reading of the law simply is wrong. Moreover, here, they did nothing to corroborate the information before invading the plaintiff’s curtilage and the crime that their informant was caught committing “red-handed” was related to drugs, not firearms.

III. THE DEFENDANTS UNLAWFULLY ENTERED THE PLAINTIFF’S CURTILAGE WITHOUT A WARRANT

The defendants continue to make the baseless argument that the area in which the defendants entered without a warrant – the plaintiff’s yard – does not constitute curtilage. To support their claim, the defendants merely copy and paste their erroneous version of the law on curtilage from their memorandum in support of judgment as a matter of law, which the plaintiff maintains still misrepresents the state of the law. As the plaintiff noted in several previous memorandums (Doc. Nos. 45, 117-1, and 119-1), the law clearly is established that one’s “curtilage,” i.e., the land around a home, is afforded the same constitutional protection as the home itself. Thus, the defendants should recognize that by admitting that the area entered “was adjacent to the plaintiff’s home,” (*see* Doc No. 120, p. 23) they tacitly acknowledge that the area was the plaintiff’s curtilage. The fact that the first area entered – i.e., the front walk and door area – is not defined as curtilage is irrelevant. The area that the defendants then invaded – the only area in dispute in this case – was curtilage and, as a result, they needed permission or a warrant before entering it.

IV. THE DEFENDANTS ARE LIABLE FOR DAMAGES TO THE PLAINTIFF DUE TO THE WARRANTLESS INTRUSION

The defendants argue, for the first time, that it is outside the scope of proximate causation that their entry onto the plaintiff’s yard would lead to an encounter with a dog that was not on a leash, that the dog would “charge” the two officers, or that they would be required to kill the dog.

The defendants also attempt to argue that it was “even more improbable” that the minor plaintiff would be in the area to call to the officer not to shoot her dog. This is an incorrect recitation of the facts presented. As the plaintiff already has noted, Mr. Harris posted “Beware of the Dog” signs on three sides of his house and there were fences on all sides of his property, with the only unfenced section existing across the driveway. (Doc. No. 117-1). For this reason, the defendants cannot credibly claim that they had no warning of the likely existence of dogs somewhere on the property. (*Id.*). In addition, and contrary to the defendants’ assertion, it certainly is foreseeable that a family with dogs might be in a fenced-in back yard with the dogs at any time, and that a dog might bark and pursue an unknown person who trespassed and then abruptly ran away. (*Id.*). Therefore, it was the defendants’ illegal entry onto the plaintiff’s yard that resulted in Seven’s death and, because it was just as likely that the plaintiff’s daughter would be in her own backyard playing with her pet, the defendants caused the plaintiffs to suffer the damages that were inflicted.

V. THE PLAINTIFF IS ENTITLED TO JUDGMENT FOR COMMON LAW TRESPASS

The defendants argue that a police officer who comes on the premises in the discharge of his duty, but without an express or implied invitation to enter, is *per se* a licensee and that, because the defendants were on the plaintiff’s property on official police business, they had tacit permission to enter.² However, a licensee is a person who is privileged to enter or remain upon land by virtue of the possessor’s *consent*, while a trespasser is defined as a person who enters or remains upon land in possession of another without any privilege to do so. *See Salaman v. Waterbury*, 246 Conn. 298, 305 (1998) and *Lin v. National Railroad Passenger Corp.*, 277 Conn. 1, 12 (2006). Here, the defendants had neither the plaintiff’s consent nor a warrant to enter his yard and, thus, more properly are considered trespassers because they were not *lawfully*

² It is important to note that this issue, like many of the other issues that the defendants raise post-trial, never was raised in any of the defendants’ pre-trial motions, their motion for summary judgment, or their jury instructions.

performing their duties.

The cases that the defendants cite are inapposite to their assertion. For example, in *Roberts v. Rosenblatt*, 146 Conn. 110 (1959), a case in which the Connecticut Supreme Court held that a fireman injured after slipping on a patch of ice on the defendant's property in the course of responding to a fire alarm, was a licensee and not an invitee, the Court stated that "the plaintiff [fireman] entered upon the premises in the performance of a public duty under a *permission created by law* and that his status was akin to that of a licensee" *Id.* at 113 (emphasis added). Similarly, the other cases that the defendants cite, but fail to analyze, also demonstrate that public servants may be considered licensees when they enter private property only when they are lawfully performing their duties. *See e.g., Haffey v. Lemieux*, 154 Conn. 185, 188 (1966) (letter carrier who fell on defendants' porch steps considered a licensee because he was *lawfully* present on the property to deliver mail); *Furstein v. Hill*, 218 Conn. 610, 615-20 (1991) (police officer injured on defendant's property while investigating a burglary after an alarm went off considered a licensee because he was "lawfully present in the exercise of his duties"); *State v. Plummer*, 241 A.2d 198 (Conn. Cir. 1967) (police officer who *lawfully* was in the defendant's apartment building and on public fire escape in the discharge of his duties was considered a licensee); and *Wroniak v. Ayala*, 1995 Conn. Super. LEXIS 1779, at *7-8 (June 13, 1995, Sheldon, J.) (police officer bitten by homeowner's dog may be licensee for purposes of a motion to strike because, "the plaintiff has alleged facts, which, if true, would establish that at the time he suffered the injuries here complained of, he was present upon the premises of the defendants *lawfully* investigating a report of a burglary. *If* those allegation are proved at trial, the plaintiff will thereby establish that at the time he was bitten by the defendants' dog he was a licensee, not a trespasser" (emphasis added)). Thus, police officers only may be considered licensees when they lawfully enter private property with the permission of the homeowner or a warrant. Here, the defendants fail to explain what they believe they were licensed to do at the time they entered and remained on the plaintiff's property; they did not have a warrant or

permission to enter and, thus, were present illegally. As a result, they were trespassers, not licensees.

Notably, the Connecticut Supreme Court has recognized that police officers who trespass in violation of the Constitution cause more harm than ordinary trespassers because of the authority they are granted. *See e.g., Binette v. Sabo*, 244 Conn. 23, 43-45 (1998) (noting that “when a law enforcement officer . . . not only fails to protect a citizen’s rights but affirmatively violates those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortuous conduct of a private citizen.”). Indeed, the holdings of the Connecticut courts, similar to federal court rulings, presume that the warrantless entry onto property is invalid, and place a heavy burden on the police to prove that the entry was valid. *See, State v. Aviles*, 277 Conn. 281, 292-93 (2006); *State v. Holmes*, 51 Conn. App. 217, 220 (1998), *cert. denied*, 248 Conn. 904 (1999). As already discussed, the defendants here failed to demonstrate that their warrantless entry was justified by any exception to the warrant requirement and, as a result, they were not lawfully present on the plaintiff’s property. Therefore, they were worse than common trespassers.

Significantly, Connecticut common law even recognizes the right of citizens to resist an illegal entry by police officers. *See e.g., State v. Gallagher*, 191 Conn. 433, 442 (1983) (noting that the State “will continue to adhere to the common law view that there are circumstances where unlawful warrantless intrusion into the home [by police] creates a privilege to resist, and that punishment of such resistance is therefore improper.”). This right remains, subject to the limitation imposed that a citizen may not commit a new crime while resisting a police officer’s unlawful entry. *State v. Brocuglio*, 264 Conn. 778, 790 (2003). There could be no right to resist an unlawful entry if, as the defendants assert, they possess, as licensees, unfettered access to private property under the guise of performing their duties, even unlawfully.

For these reasons, the plaintiff is entitled to judgment as a matter of law for the

defendants' common law trespass.

VI. THE REMAINING CLAIMS ARE SO INTERTWINED WITH THE JURY'S ERRONEOUS CONCLUSION THAT THE COURT SHOULD GRANT A NEW TRIAL ON ALL REMAINING ISSUES WITH PROPER GUIDANCE

Contrary to the defendants' assertion, it is highly *likely* that the jury would have reached a different result in this case if it were given the proper jury instructions regarding the illegal nature of the defendants' entry onto the plaintiff's premises, excluding the "exigent circumstances" red herring. An erroneous verdict was reached by the jury only because they did not properly understand that the defendants illegally entered the plaintiff's yard from the outset because they possessed no justification for their warrantless entry. For this reason, the jury's verdict is seriously erroneous and should be set aside in its entirety.

VII. CONCLUSION

For the foregoing reasons, and for those previously submitted to this court, the plaintiff should be granted judgment as a matter of law on the fourth amendment and trespass claims. In addition, or in the alternative, the plaintiff should be granted a new trial.

THE PLAINTIFF—
GLENN HARRIS, PPA,

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (Fed Bar #ct00119)
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: jon@schoenhorn.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn

Jon L. Schoenhorn

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually	:	
and P.P.A. as guardian for	:	
K.H., a minor child,	:	
	:	
Plaintiff,	:	
	:	
V.	:	Case No. 3:08-CV-1644 (RNC)
	:	
JOHNMICHAEL O'HARE, ET AL.,	:	
	:	
Defendants.	:	

RULING AND ORDER

This case is before the Court on the plaintiff's post-trial motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, alternatively, a new trial pursuant to Fed. R. Civ. P. 59, and the defendants' renewed motion for judgment as a matter law based on qualified immunity. For reasons that follow, the plaintiff's motion is denied. Because the plaintiff's motion is denied, the defendants' motion is denied as moot.

The evidence presented at trial, viewed most favorably to the defendants, permitted the jury to find the following facts. On December 20, 2006, Officer O'Hare and another officer were on duty in a high crime area. Their assignment was to locate and seize illegal guns. They saw George Hemingway, a leader of the West Hill street gang, drop a package on the ground and walk away. Hemingway had recently been released from prison on a gun charge and was on parole. The officers inspected the package, found it contained a quantity of heroin, and seized Hemingway.

Hemingway immediately agreed to cooperate with the officers by providing information concerning the location of illegal guns. After placing a call on his cell phone, he told the officers that two guns were about to be placed in an abandoned Nissan Maxima in the back yard of 297 Enfield Street. Hemingway had no track record as an informant, but the officers credited his information concerning the guns. The experienced officers thought the information provided by Hemingway was reliable because members of the West Hill Street gang were known to move guns frequently for safekeeping, the tip was reasonably detailed, Hemingway was highly motivated to help the officers due to his legal predicament, and it would be against his interest to give them inaccurate information. The officers believed they had to act quickly to apprehend the person stashing the guns and to seize the guns before they could be moved to another location.

Officer O'Hare immediately drove to the address provided by Hemingway. He was accompanied by Officer Pia. The address proved to be the plaintiff's residence. The officers entered the front yard of the residence through an open gate, then moved along the right side of house in the direction of the back yard. They moved single-file with Officer O'Hare in the lead and Officer Pia following directly behind. The officers were holding their service weapons at their sides in a low ready position. When Officer O'Hare reached the rear corner of the house, he

peeked into the back yard, and saw the plaintiff's dog, a large Saint Bernard. The dog saw the officer and ran toward him. The officers immediately retreated as quickly as they could. The dog pursued them and the officers could hear the dog barking and snarling as they ran. When Officer O'Hare reached the front yard, he sensed that the dog would attack him from behind before he could safely reach the street. He therefore turned toward the dog while raising his weapon in self-defense. The dog continued to approach the officer then lunged in an aggressive manner. As the dog lunged, the officer fired three shots in rapid succession. One of the bullets entered the dog's skull causing a fatal wound.

II. Discussion

The plaintiff urges that he is entitled to judgment as a matter of law because the officers' warrantless entry into the yard was illegal under the Fourth Amendment and state law, and this illegality makes the defendants' liable for the killing of the dog. A motion for judgment as a matter of law may be granted on an issue only when there is no legally sufficient evidentiary basis to support the jury verdict. Fed. R. Civ. P. 50(a); Nadel v. Isaksson, 321 F.3d 266, 272 (2d Cir. 2003). In other words, the motion must be denied unless the "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be

but one conclusion as to the verdict that reasonable [persons] could have reached." Id. (internal quotation omitted) (alteration in original).

Applying this standard, the plaintiff's motion is denied. The jury could reasonably conclude that the officers' entry was supported by probable cause and exigent circumstances. See Loria v. Gorman, 306 F.3d 1271, 1283 (2d Cir. 2002). "[T]he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." United States v. Delossantos, 536 F.3d 155, 159 (2d Cir. 2008) (citations and internal quotation marks omitted). Considering the totality of the circumstances, as the jury was obliged to do, the jury could credit the experienced officers' testimony that Hemingway's tip provided probable cause that two guns would be found at this location.

With regard to the issue of exigent circumstances, the jury could credit the officers' testimony that they had an urgent need to take action to seize the guns before a warrant could be obtained. The officers explained that in their experience, illegal guns moved quickly, and they did not expect the guns to be in the Maxima for long. The jury also could credit the officers' testimony that there was no reasonable alternative to entering the property to seize the guns, such as cordoning off

the property while a warrant was obtained.

Plaintiff's motion for a new trial is denied because the jury verdict is not against the clear weight of the evidence.

III. Conclusion

Accordingly, the plaintiff's motion for judgment as a matter of law or, alternatively, for a new trial is hereby denied, and defendants' renewed motion for judgment based on qualified immunity is hereby denied as moot.

_____/s/_____
Robert N. Chatigny
United States District Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	OCTOBER 3, 2012

BILL OF COSTS

Pursuant to Local Rule 54(a), the Defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, hereby submit their bill of costs in the above-captioned case. The Court entered judgment for the Defendants on September 28, 2012. This Bill of Costs is filed within ten (10) days after the Judgment became final due to the expiration of the appeal period pursuant to Local Rule 54(a)1. A verification pursuant to 28 U.S.C. § 1924 is attached hereto as **Exhibit A**.

1. Local Rule 54(c)1 – Fees of Clerk and Marshal

Subpoena for non-party witness Wheeler Clinic	\$50.00
Subpoena for non-party witness Institute of Living	\$50.00

(See, Exhibit 1 attached to Exhibit B)

2. Local Rule 54(c)2 – Fees of Court Reporter

Deposition Transcript for Glenn Harris (Original + 1 copy)	\$536.50
Court Reporter Appearance Fee for Harris	\$ 95.00
Deposition Transcript for KH (orig + 1 copy)	\$222.00
Deposition Transcripts for JohnMichael O'Hare, Anthony Pia and Gabe Laureano (1 copy)	\$795.00

(See, Exhibit 2 attached to Exhibit B)

**3. Local Rule 54(c)3 – Fees for Exemplification
and Copies of Papers Necessarily Obtained for
Use in the Case**

Documents Admitted Into Evidence (color copy – 19 @ \$1.00)	\$19.00
Documents Admitted Into Evidence (black & white copy – 68 @.14)	\$ 9.52

(See, Exhibit 3 attached to Exhibit B)

**4. Local Rule 54(c)5 – Maps, Charts, Models,
Photographs, Summaries, Computations and
Statistical Summaries**

Cost for Aerial Map	\$650.00
---------------------	----------

(See, Exhibit 4 attached to Exhibit B)

TOTAL COSTS REQUESTED:	\$2,427.02
-------------------------------	-------------------

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on October 3, 2012, a copy of the foregoing Bill of Costs was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak

Alan R. Dembiczak

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

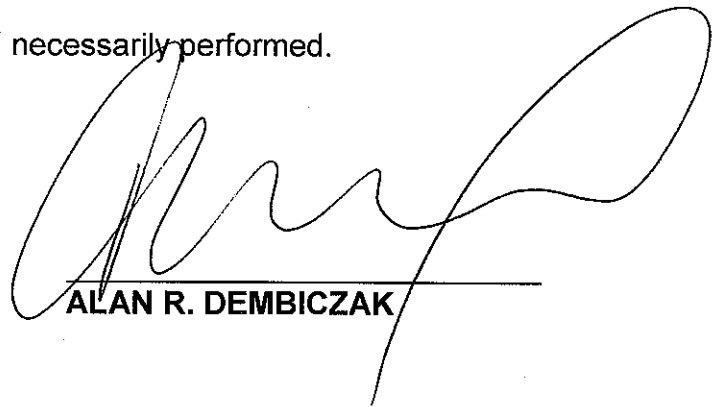
GLEN HARRIS, Individually and P.P.A. as Guardian for K.H., a minor child	:	NO.: 3:08CV01644-RNC
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE, ANTHONY PIA, and CITY OF HARTFORD	:	OCTOBER 3, 2012

VERIFICATION OF ALAN R. DEMBICZAK

The undersigned, being duly sworn, hereby deposes and says:

1. I am over eighteen (18) years of age and I believe in the obligation of an oath;
2. I am a member of the Bars of the State of Connecticut and the United States District Court for the District of Connecticut;
3. I represented the defendants, JOHNMICHAEL O'HARE and ANTHONY PIA, in the above captioned case and have knowledge of the facts of the case and the costs incurred by the defendants in defending this case;
4. A true and accurate copy of the invoice for the subpoenas of non-party witnesses is annexed as **Exhibit 1**;
5. True and accurate copies of the invoices for Deposition Transcripts and Court Reporter Appearance Fees are annexed as **Exhibit 2**;
6. True and accurate copies of the invoices for copies of Documents Admitted Into Evidence are annexed as **Exhibit 3**;
7. A true and accurate copy of the invoice for the cost of the Aerial Map used at trial is annexed as **Exhibit 4**;


8. The items in the Defendants' Bill of Costs are correct and have been necessarily incurred in this case and the services for which fees have been charged were actually and necessarily performed.



ALAN R. DEMBICZAK

STATE OF CONNECTICUT)
) ss: Hartford
COUNTY OF HARTFORD)

Subscribed and sworn before me this 3rd day of October, 2012



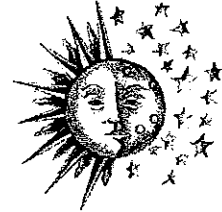
Jay Don Francisco, Esq.
Commissioner Of The Superior Court

EXHIBIT B

EXHIBIT 1

May 15, 2012**Connecticut Process Serving, LLC**

67 Burnside Avenue
 East Hartford, CT 06108
 860.528.2920, (860) 528.2720 Fax

RETURN SERVICE REQUESTEDOur EIN # **06-1445325**

Alan R. Dembiczak, Esquire
 Howd & Ludorf, LLC
 65 Wethersfield Avenue
 Hartford, CT 06114-1121

860-249-1361 Business
 860-249-7665 Fax

Reference Invoice # **142260** when remitting.
 Your Reference No.

Glen Harris ppa as Guardian of K.H. vs City of Hartford, et al	Service of Process - Routine	\$50.00
Docket Number: 3:08-CV-01644 (RNC)		
Subpoena In a Civil Case;		
Completed Wheeler Clinic		
Manner: CORPORATE		
on 05/15/2012 at 1:50 PM,		
at Keeper of Records 91 North West Drive		
Plainville, CT 06062		
by Michael Walton		
Action/Hearing Date 05/21/2012, @ 9:00 AM.		

BALANCE DUE: \$50.00

Thank You!
We Appreciate Your Business.

~~A \$15.00 Administrative fee will be assessed to each invoice 45 days outstanding!~~

205-15146

Harris v O'Hare

VCHR 61473 CASE _____

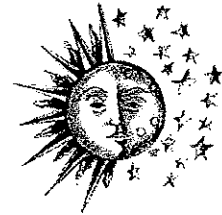
CHX _____ PAID _____

Connecticut Process Serving, LLC

67 Burnside Avenue
East Hartford, CT 06108
860.528.2920, (860) 528.2720 Fax

RETURN SERVICE REQUESTED

Our EIN # 06-1445325



Alan R. Dembiczak, Esquire
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-1121

860-249-1361 Business
860-249-7665 Fax

Reference Invoice # **142263** when remitting.
Your Reference No.

Glen Harris ppa as Guardian of K.H. vs City of Hartford, et al	Service of Process - Routine	\$50.00
---	------------------------------	---------

Docket Number: 3:08-CV-01644 (RNC)

Subpoena In a Civil Case

Completed The Institute of Living

Manner: **CORPORATE**

on 05/14/2012 at 12:20 PM,

at c/o Hartford Hospital, Keeper of Records 80

Seymour Street

Hartford, CT 06106

by Christine Foran

Action/Hearing Date 05/21/2012, @ 9:00 AM.

BALANCE DUE: \$50.00

Thank You!
We Appreciate Your Business.

A \$15.00 Administrative fee will be assessed to each invoice 45 days outstanding!

205-15146

HARRIS v O'Hare

VCHR61474 CASE _____

CHX _____ PAID _____

EXHIBIT 2

INVOICE

Niziankiewicz & Miller Reporting Services, LLC
 972 Tolland Street
 East Hartford, CT 06108-1533
 Phone:860-291-9191 Fax:860-528-1972

Invoice No.	Invoice Date	Job No.
14903	6/10/2009	22037
Job Date	Case No.	
5/6/2009	3:08CV01644-RNC	
Case Name		
Harris vs. O'Hare		
Payment Terms		
Due upon receipt		

Thomas R. Gerarde, Esquire
 Howd & Ludorf, LLC
 65 Wethersfield Avenue
 Hartford, CT 06114-1190

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

Glen Harris		536.50
Appearance Fee	95.00	95.00
Postage	6.00	6.00

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

K.H.		222.00
SALES TAX		51.57

TOTAL DUE >>> \$911.07

Court Reporter: Gosselin

THANK YOU!!!
 WE APPRECIATE YOUR BUSINESS!!!

After 30 days a Finance Charge with a periodic rate of 1.5% on the overdue balance will be charged.
 (ANNUAL PERCENTAGE RATE = 18.00%)

Tax ID: 06-1113444

Phone: 860-249-1361 Fax:

Please detach bottom portion and return with payment.

Thomas R. Gerarde, Esquire
 Howd & Ludorf, LLC
 65 Wethersfield Avenue
 Hartford, CT 06114-1190

Invoice No. : 14903
 Invoice Date : 6/10/2009
 Total Due : \$ 911.07

Remit To: **Niziankiewicz & Miller Reporting Services,
 LLC
 972 Tolland Street
 East Hartford, CT 06108-1533**

Job No. : 22037
 BU ID : 1-MAIN
 Case No. : 3:08CV01644-RNC
 Case Name : Harris vs. O'Hare

Andrews Reporting Service

Court Reporters

INVOICE

July 2, 2009

Thomas R. Gerard, Esq.
Howd & Ludorf
65 Wethersfield Avenue
Hartford, CT 06114

Sandy K. Visentin d/b/a
Andrews Reporting Service, LLC
Fed. I.D. No. 06-1331990

Invoice No. 9-207

IN RE: Glen Harris, individually and PPA vs. Johnmichael O'Hare, et al.

CASE NO.: 3:08-CV-01644 (RNC)
DEPO DATE: June 3 and June 15, 2009
DEPONENT(S): Anthony Pia – 100 pgs
Johnmichael O'Hare – 136 pgs
Gabriel Laureano – 82 pgs

TRANSCRIPT:

1 copy: 318 pgs @ 2.50/pg	\$ 795.00
EXHIBIT COPIES: 30 p @ .20/pg	6.00
ASCII DISK: (3 depos)	75.00
WORD INDEX: (3 depos)	75.00

SUBTOTAL: \$ 951.00
6 % SALES TAX: n/a
DELIVERY/POSTAGE: 12.95

TOTAL DUE: \$ 963.95

****PAYMENT DUE UPON RECEIPT****

THANK YOU
Reporter: Sandy Visentin, RPR, LSR

EXHIBIT 3

ONE Stop Copy Shop

111 Pitkin St

East Hartford, CT 06108

Phone # (860) 722-9992 Fax # (860) 722-9507

Tax ID:61-1418869

Invoice

Date	Invoice #
5/17/2012	12-01579

Bill To
Howd & Ludorf 65 Wethersfield Avenue Hartford, CT 06114-1190

*Redacted Meds for Trial
Exh. Notebooks & CD's*

Ordered By	Rep	Terms	Reference
Sophia	HS	Net 15	205-15146

Description	Quantity	Rate	Amount
8 1/2 x 11 Copies "D" Work	594	0.14	83.16T
8 1/2 x 11 Color Copies	45	1.00	45.00T
3 Hole Drilling	710	0.01	7.10T
Document Scanning	66	0.14	9.24T
Color Scanning 8.5x11	5	2.00	10.00T
File Labeling	5	1.50	7.50T
CD Creation	1	25.00	25.00T
CD Duplication	5	15.00	75.00T

205-15146

HARRIS v O'Hare

VCHR61541 CASE

CHX PAID

Sales Tax (6.35%) ~~\$16.64~~**Total** \$278.64

A finance charge of 1.5% will be added to all invoices
over 30 days.

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.
as Guardian for K.H., a minor child

v.

Civil No. 3:08cv1644 (RNC)

JOHNMICHAEL O'HARE,
ANTHONY PIA and
CITY OF HARTFORD

ORDER ON DEFENDANTS O'HARE AND PIA'S BILL OF COSTS

The taxing of costs in this case follows. If the full amount is not awarded, an explanation for the reduction is provided below.

<u>ITEM CLAIMED</u>	<u>AMOUNT CLAIMED</u>	<u>AMOUNT ALLOWED</u>
<u>Fees of the Marshal:</u>		
1. Subpoena Wheeler Clinic	\$ 50.00	\$ 50.00
2. Subpoena Institute of Living	\$ 50.00	\$ 50.00
Total Fees of the Marshal:	\$ 100.00	\$ 100.00
<u>Court Reporter's Fees:</u>		
3. Harris Deposition	\$ 536.50	\$ 536.50
4. Court reporter appearance for Harris deposition	\$ 95.00	\$ 95.00
5. KH Deposition	\$ 222.00	\$ 222.00
6. O'Hare, Pia & Laureno Depositions	\$ 795.00	\$ 795.00
Total Court Reporter's Fees:	\$ 1,648.50	\$ 1,648.50
<u>Fees for Copies:</u>		
7. Color copies -evidence	\$ 19.00	\$ 19.00
8. Black & white copies - evidence	\$ 9.52	\$ 9.52
Total Fees for Copies	\$ 28.52	\$ 28.52
<u>Fees for Maps:</u>		
9. Ariel Map	\$ 650.00	\$ 0
Total Fees for Maps	\$ 650.00	\$ 0

Total Costs Awarded:	\$ 2,427.02	\$ 1,777.02
-----------------------------	-------------	-------------

Item 9: The cost of oversized maps are not allowed. D. Conn. L. Civ. R. 54(c)5.

Pursuant to Local Rule 54(d), the parties may appeal this decision to the presiding judge on or before November 6, 2012.

Dated at Bridgeport, Connecticut, this 23rd day of October 2012.

ROBIN D. TABORA, CLERK

BY: /s/ Donna P. Thomas
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	OCTOBER 24, 2012

OBJECTION OF DECISION ON BILL OF COSTS

Pursuant to D. Conn. L. Civ. R. 54(d) the undersigned defendants hereby appeal the court's ruling on their Bill of Costs dated October 3, 2012. The court allowed all costs except for Item 9, claiming that the cost of oversized maps are not allowed pursuant to D. Conn. L. Civ. R. 52(c)5. However, Item 9 was not for the cost of an oversized map. The \$650.00 expense was not for copying or enlargements. Instead, it was the cost associated with the aerial fly-over to produce the map itself. It is in no way related to copying or enlargement. This is further evidenced by *Exhibit 4* to the Bill of Costs, which is the invoice for the cost of the map. As can be seen by said invoice, it is not for copying or enlargement, but instead for the production of the aerial photograph. Said photograph was admitted into evidence at trial.

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on October 24, 2012, a copy of the foregoing Objection of Decision on Bill of Costs was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually, and P.P.A	:	CIVIL ACTION NO. 3:08CV1644(RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs,	:	
V.	:	
	:	
JOHNMICHAEL O'HARE;	:	
ANTHONY PIA; and	:	
CITY OF HARTFORD,	:	
Defendants.	:	OCTOBER 25, 2012

NOTICE OF APPEAL

Pursuant to Federal Rule of Appellate Procedure 3(a)(1), the plaintiffs, Glen Harris and his minor child, KH, hereby give notice and appeal to the United States Court of Appeals for the Second Circuit from the following Judgments or Orders:

1. JUDGMENT dated September 28, 2012, in favor of the defendants on all counts.
2. RULING AND ORDER dated September 27, 2012, by *Chatigny, J.*, denying Plaintiff's Motion for Judgment as a Matter of Law and Motion for New Trial.

The judgment in this action was entered on September 28, 2012 and is attached hereto as **Exhibit A**. The jury verdict, which was filed on May 29, 2012, is attached hereto as **Exhibit B**. The Ruling and Order on Plaintiff's Motion for Judgment as a Matter of Law and Motion for New Trial was entered on September 27, 2012 and is attached hereto as **Exhibit C**.

THE PLAINTIFF—
GLENN HARRIS, PPA,
By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (Fed Bar #ct00119)
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: jon@schoenhorn.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn

Jon L. Schoenhorn

EXHIBIT A

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
FILED AT HARTFORD

GLEN HARRIS, individually and
P.P.A. as guardian for K.H., a
minor child,

Plaintiff,

v.

JOHNMICHAEL O'HARE, ET AL.,

Defendants.

5/29 2012
Robert D. Tabora, Clerk
By *[Signature]*
Deputy Clerk

CASE NO. 3:08CV1644 (RNC)

VERDICT FORM

We the Jury unanimously find as follows:

I. LIABILITY

A. Claims under 42 U.S.C. § 1983

1. Fourth Amendment: Unreasonable Search

a. Has the plaintiff proven that either of the defendants
violated the Fourth Amendment's prohibition against
unreasonable searches by entering the curtilage of his home
without a warrant in the absence of an exception to the
warrant requirement?

Johnmichael O'Hare Yes ☐ No ☒

Anthony Pia Yes ☐ No ☒

If your answer is "Yes" for either defendant, go to subpart b.

If your answer is "No" for both defendants, go to Question 2.

b. Has the plaintiff proven that the defendants conspired to violate his Fourth Amendment right to be free of unreasonable searches?

Yes _____ No _____

2. Fourth Amendment: Unreasonable Seizure

a. Has the plaintiff proven that Officer O'Hare violated the Fourth Amendment's prohibition against unreasonable seizures when he killed the plaintiff's dog?

Yes _____ No X

If your answer is "Yes," go to subpart b. If your answer is "No," go to Question 3.

b. Has the plaintiff proven that Officer Pia is liable for the unreasonable seizure because he had a reasonable opportunity to intervene to prevent it but failed to do so?

Yes _____ No _____

3. Fourteenth Amendment: Due Process

Has the plaintiff proven that when Officer O'Hare shot the dog, he engaged in conduct that shocks the conscience and thus violated the Due Process Clause of the Fourteenth Amendment?

Yes ☐ No ☒

If you have answered "Yes" in response to any of Questions 1-3, you have found a violation of either the plaintiff's or K.'s constitutional rights. In that event, go to Question 4. If you have answered "No" in response to Questions 1-3, then skip Question 4 and go to Question 5.

4. Causation

Has the plaintiff proven that he or K. suffered injuries that were proximately caused by a violation of his or her constitutional rights?

Yes ☐ No ☐

B. Claims Under Connecticut Tort Law

5. Intentional Infliction of Emotional Distress

Has the plaintiff proven that Officer O'Hare engaged in extreme and outrageous conduct that was intended to cause emotional distress to K. and did in fact cause her severe emotional distress?

Yes No X

6. Trespass

Has the plaintiff proven that either of the defendants trespassed on his land in violation of state law?

Johnmichael O'Hare Yes No X

Anthony Pia Yes No X

7. Conversion

Has the plaintiff proven that either of the defendants committed conversion under state law by depriving him of his dog?

Johnmichael O'Hare Yes No X

Anthony Pia Yes No X

If you have answered "Yes" in response to any of Questions 1-7, go to Part II. If you have answered "No" in response to Questions 1-7, your deliberations are complete.

II. DAMAGES

A. Compensatory Damages

1. Amount of Compensatory Damages

If you have found either of the defendants liable for a violation of the plaintiff's or K.'s constitutional rights, and you have found that the plaintiff or K. sustained injuries as a proximate result of the violation (by answering "Yes" to Question 4); or if you have found either defendant liable for intentional infliction of emotional distress, trespass or conversion, what amount of damages do you award to reasonably compensate the plaintiff or K. for his or her injuries proximately caused by the unlawful conduct?

Glenn Harris \$ _____

K. \$ _____

B. Nominal Damages2. Amount of Nominal Damages

If you have found that the plaintiff's or K.'s constitutional rights were violated by a defendant (by answering "Yes" to a question in Part I.A.), but you have found that the plaintiff has failed to prove any injuries proximately caused by that defendant's unlawful conduct, what nominal damages do you award each plaintiff?

Glenn Harris \$ _____

K. \$ _____

C. Punitive Damages: Constitutional Claims3. Assessment of Punitive Damages

a. Do you find the plaintiff has proven that punitive damages should be assessed against either defendant for violating Mr. Harris's constitutional rights?

Johnmichael O'Hare Yes _____ No _____

Anthony Pia Yes _____ No _____

b. Do you find the plaintiff has proven that punitive damages should be assessed against either defendant for violating K.'s constitutional rights?

Johnmichael O'Hare Yes _____ No _____

Anthony Pia Yes _____ No _____

4. Amount of Punitive Damages

a. If you have found that the plaintiff has proven that punitive damages should be assessed against one or both defendants for a violation of his constitutional rights, enter the amount of punitive damages you award the plaintiff against each such defendant.

Johnmichael O'Hare	\$	_____
Anthony Pia	\$	_____

b. If you have found that the plaintiff has proven that punitive damages should be assessed against one or both defendants for a violation of K.'s constitutional rights, enter the amount of punitive damages you award K. against each such defendant.

Johnmichael O'Hare	\$	_____
Anthony Pia	\$	_____

C. Punitive Damages: State Law Claims

5. Assessment of Punitive Damages

a. Do you find that the plaintiff has proven that punitive damages should be assessed against either or both defendants on Mr. Harris's state law claims of intentional infliction of emotional distress, trespass and conversion? (If you answer "Yes" as to either defendant, the Court will determine the amount of punitive damages to be awarded in a separate proceeding.)

Johnmichael O'Hare	Yes	_____	No	_____
Anthony Pia	Yes	_____	No	_____

b. Do you find that the plaintiff has proven that punitive damages should be assessed against either or both defendants on K.'s state law claims of intentional infliction of emotional distress, trespass and conversion? (If you answer "Yes" as to either defendant, the Court will determine the amount of punitive damages to be awarded in a separate proceeding.)

Johnmichael O'Hare	Yes	_____	No	_____
Anthony Pia	Yes	_____	No	_____

You have completed your deliberations. The Foreperson should sign and date the Verdict Form.

Date 5/29/2012

Foreperson Signature ~

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, individually	:	
and P.P.A. as guardian for	:	
K.H., a minor child,	:	
	:	
Plaintiff,	:	
	:	
V.	:	Case No. 3:08-CV-1644 (RNC)
	:	
JOHNMICHAEL O'HARE, ET AL.,	:	
	:	
Defendants.	:	

RULING AND ORDER

This case is before the Court on the plaintiff's post-trial motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, alternatively, a new trial pursuant to Fed. R. Civ. P. 59, and the defendants' renewed motion for judgment as a matter law based on qualified immunity. For reasons that follow, the plaintiff's motion is denied. Because the plaintiff's motion is denied, the defendants' motion is denied as moot.

The evidence presented at trial, viewed most favorably to the defendants, permitted the jury to find the following facts. On December 20, 2006, Officer O'Hare and another officer were on duty in a high crime area. Their assignment was to locate and seize illegal guns. They saw George Hemingway, a leader of the West Hill street gang, drop a package on the ground and walk away. Hemingway had recently been released from prison on a gun charge and was on parole. The officers inspected the package, found it contained a quantity of heroin, and seized Hemingway.

Hemingway immediately agreed to cooperate with the officers by providing information concerning the location of illegal guns. After placing a call on his cell phone, he told the officers that two guns were about to be placed in an abandoned Nissan Maxima in the back yard of 297 Enfield Street. Hemingway had no track record as an informant, but the officers credited his information concerning the guns. The experienced officers thought the information provided by Hemingway was reliable because members of the West Hill Street gang were known to move guns frequently for safekeeping, the tip was reasonably detailed, Hemingway was highly motivated to help the officers due to his legal predicament, and it would be against his interest to give them inaccurate information. The officers believed they had to act quickly to apprehend the person stashing the guns and to seize the guns before they could be moved to another location.

Officer O'Hare immediately drove to the address provided by Hemingway. He was accompanied by Officer Pia. The address proved to be the plaintiff's residence. The officers entered the front yard of the residence through an open gate, then moved along the right side of house in the direction of the back yard. They moved single-file with Officer O'Hare in the lead and Officer Pia following directly behind. The officers were holding their service weapons at their sides in a low ready position. When Officer O'Hare reached the rear corner of the house, he

peeked into the back yard, and saw the plaintiff's dog, a large Saint Bernard. The dog saw the officer and ran toward him. The officers immediately retreated as quickly as they could. The dog pursued them and the officers could hear the dog barking and snarling as they ran. When Officer O'Hare reached the front yard, he sensed that the dog would attack him from behind before he could safely reach the street. He therefore turned toward the dog while raising his weapon in self-defense. The dog continued to approach the officer then lunged in an aggressive manner. As the dog lunged, the officer fired three shots in rapid succession. One of the bullets entered the dog's skull causing a fatal wound.

II. Discussion

The plaintiff urges that he is entitled to judgment as a matter of law because the officers' warrantless entry into the yard was illegal under the Fourth Amendment and state law, and this illegality makes the defendants' liable for the killing of the dog. A motion for judgment as a matter of law may be granted on an issue only when there is no legally sufficient evidentiary basis to support the jury verdict. Fed. R. Civ. P. 50(a); Nadel v. Isaksson, 321 F.3d 266, 272 (2d Cir. 2003). In other words, the motion must be denied unless the "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be

but one conclusion as to the verdict that reasonable [persons] could have reached." Id. (internal quotation omitted) (alteration in original).

Applying this standard, the plaintiff's motion is denied. The jury could reasonably conclude that the officers' entry was supported by probable cause and exigent circumstances. See Loria v. Gorman, 306 F.3d 1271, 1283 (2d Cir. 2002). "[T]he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." United States v. Delossantos, 536 F.3d 155, 159 (2d Cir. 2008) (citations and internal quotation marks omitted). Considering the totality of the circumstances, as the jury was obliged to do, the jury could credit the experienced officers' testimony that Hemingway's tip provided probable cause that two guns would be found at this location.

With regard to the issue of exigent circumstances, the jury could credit the officers' testimony that they had an urgent need to take action to seize the guns before a warrant could be obtained. The officers explained that in their experience, illegal guns moved quickly, and they did not expect the guns to be in the Maxima for long. The jury also could credit the officers' testimony that there was no reasonable alternative to entering the property to seize the guns, such as cordoning off

the property while a warrant was obtained.

Plaintiff's motion for a new trial is denied because the jury verdict is not against the clear weight of the evidence.

III. Conclusion

Accordingly, the plaintiff's motion for judgment as a matter of law or, alternatively, for a new trial is hereby denied, and defendants' renewed motion for judgment based on qualified immunity is hereby denied as moot.

_____/s/_____
Robert N. Chatigny
United States District Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

GLEN HARRIS, individually, and P.P.A	:	CIVIL ACTION NO. 3:08CV1644(RNC)
as guardian for K.H., a minor child,	:	
Plaintiffs,	:	
V.	:	
	:	
JOHNMICHAEL O'HARE;	:	
ANTHONY PIA; and	:	
CITY OF HARTFORD,	:	
Defendants.	:	OCTOBER 26, 2012

REPLY TO DEFENDANTS' OBJECTION ON BILL OF COSTS

Pursuant to D. Conn. L. Civ. R. 54(d), the plaintiff, by and through counsel, submits this reply to the defendants' objection to the court's ruling on their Bill of Costs dated October 3, 2012. The court correctly denied the defendants' costs with respect to the \$650.00 oversized aerial map, pursuant to D. Conn. L. Civ. R. 54(c)(5). The cost of this map was an unnecessary expense because it depicted the same picture that the defendants could have obtained from a free service such as Google maps. Moreover, D. Conn. L. Civ. R. 54(c)(5) does not permit costs for an aerial fly-over to produce a map or photograph. The defendants' oversized map was not a relevant expense and, thus, the court was right to reject the defendants' costs for this item.

THE PLAINTIFF—
GLENN HARRIS, PPA

By /s/ Jon L. Schoenhorn
Jon L. Schoenhorn, Esq. (Fed Bar #ct00119)
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106
T: (860) 278-3500
F: (860) 278-6393
E: jon@schoenhorn.com

CERTIFICATION

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GLEN HARRIS, Individually and P.P.A.	:	NO.: 3:08CV01644-RNC
as Guardian for K.H., a minor child	:	
	:	
v.	:	
	:	
JOHNMICHAEL O'HARE,	:	
ANTHONY PIA, and	:	
CITY OF HARTFORD	:	NOVEMBER 1, 2012

REPLY TO PLAINTIFF'S RESPONSE TO OBJECTION TO
RULING ON BILL OF COSTS

The plaintiff's argument that the map was an "unnecessary expense" is not supported by any legal authority whatsoever. There is no "necessary expense" requirement in any of the Rules, and more specifically D. Conn. L. Civ. R. 54(c)(5). Furthermore, all of the free services rendered pictures with very poor resolution. A high resolution aerial map was necessary to aid the jury in understanding the facts of the case. Also, the plaintiff's argument that D. Conn. L. Civ. R. 54(c)(5) does not permit costs for an aerial fly-over to produce a map or photograph is wholly unsupported by any legal authority. There is no distinction as to what kinds of maps are or are not allowed as costs under the D. Conn. L. Civ. R. 54(c)(5). Finally, the plaintiff's argument that the defendants' oversized map was not a relevant expense, is not only incorrect, but unsupported by any legal authority. Again, the map was not an "oversized" map. Also, there is no legal authority whatsoever for the argument that the cost of the map should not be allowed because it is not a "relevant expense."

DEFENDANTS,
JOHNMICHAEL O'HARE
and ANTHONY PIA

By /s/ Alan R. Dembiczak
Alan R. Dembiczak
ct25755
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114-11921
Ph: (860) 249-1361
Fax: (860) 249-7665
E-mail: adembiczak@hl-law.com

CERTIFICATION

This is to certify that on November 1, 2012, a copy of the foregoing Reply to Response to Objection to Ruling on Bill of Costs was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106-1514

Nathalie Feola-Guerrieri, Esq.
Assistant Corporation Counsel
City of Hartford
550 Main Street
Hartford, CT 06103

/s/ Alan R. Dembiczak
Alan R. Dembiczak